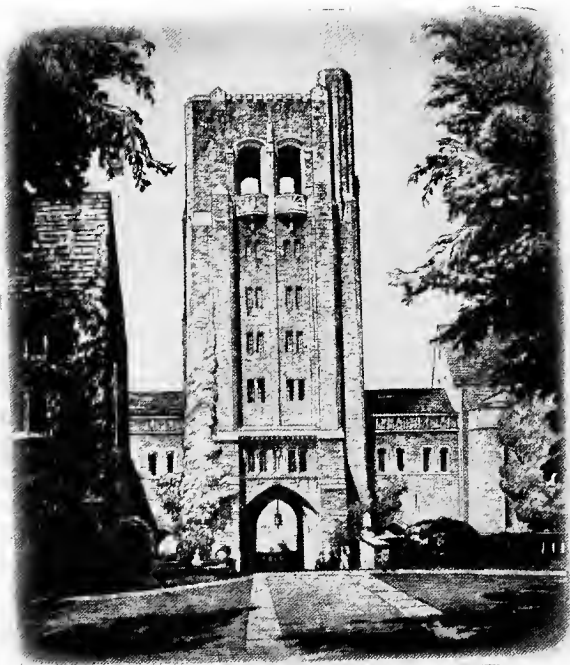


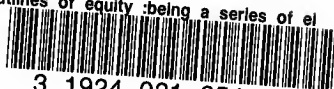
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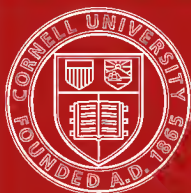


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OUTLINES OF EQUITY,

BEING

A SERIES OF ELEMENTARY LECTURES ON
EQUITY JURISDICTION,

DELIVERED AT THE REQUEST OF THE INCORPORATED LAW SOCIETY ;

WITH

Supplementary Lectures on Certain Doctrines of Equity,

AND

OBSERVATIONS ON THE DEFENCE OF PURCHASE FOR
VALUABLE CONSIDERATION WITHOUT NOTICE.

BY

FREEMAN OLIVER HAYNES,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

FORMERLY FELLOW OF CAIUS COLLEGE, CAMBRIDGE.

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TO
THE RIGHT HONOURABLE
JOHN LORD ROMILLY
&c. &c. &c.
WHO
WHILE INHERITING A NAME
ALREADY ILLUSTRIOUS IN OUR LEGAL ANNALS
HAS HIMSELF ASSOCIATED THAT NAME WITH THE ANCIENT DIGNITY OF
MASTER OF THE ROLLS
THE FOLLOWING OUTLINES OF EQUITY
ORIGINALLY SKETCHED FOR THE INSTRUCTION OF
ASPIRANTS TO A PROFESSION
OVER WHICH HIS HIGH OFFICE GIVES HIM A SPECIAL SUPERVISION
ARE
WITH PERMISSION
MOST RESPECTFULLY INSCRIBED.

PREFACE.

THE Fourth Edition (3000 copies) of these Outlines being now exhausted, a New Edition is offered to the Public.

The principal alterations made consist in expunging those portions of the former contents which related to the old practice of the Court of Chancery, and in adding a sketch in which an attempt is made to elucidate the principles by which the defence of purchase for valuable consideration without notice is governed.

The notes have been carefully revised and references to the more recent decisions added.

F. O. HAYNES.

LINCOLN'S INN,
April 7, 1880.

PREFACE TO THE FIRST EDITION.

THE following pages are little more than the reproduction in print of a Course of Elementary Lectures on Equity, recently delivered at the request of the Incorporated Law Society.

It has been represented to me by friends of my own profession, who have read my Lectures, that the publication of them is likely to be useful; that while a voluminous treatise alarms a beginner, a condensed manual, containing often in a single sentence the abstract result of a mass of decision, is beyond his strength; and that the following sketches are well suited to convey elementary knowledge in Equity, both to gentlemen reading in Barristers' Chambers, and to students such as those to whom my oral teaching was addressed.

It has been further suggested to me, that some outlines of our Equity system may be useful to University undergraduates who have selected law as

part of their curriculum, and interesting to educated laymen of maturer years.

Finally, should my friends have formed a mistaken estimate of the general utility of my performance, it is, perhaps, not too much to presume, that at least those individual gentlemen to whom my Lectures were delivered may derive advantage from refreshing their memory by a perusal of them.

LINCOLN'S INN,
1858.

PREFACE TO THE SECOND EDITION.

THE anticipations expressed by the Author in his Preface to the former Edition of these Lectures have in some respects been surpassed, his work having been thought of sufficient merit to warrant its adoption as a class-book for Bar Students. He has, in consequence, while preparing a second edition, now called for, ventured to assume that there is a real need on the part of students beginning their law reading for accurate information respecting Equity, conveyed in a less condensed form than is commonly adopted by elementary treatises; and, so assuming, he has included in this Edition four Lectures (part of a second course) on the equity doctrines of "Election," "Satisfaction," and "Conversion."

No attempt has been made to alter or re-write any portion of the Lectures, so as to adapt them (in the few cases needful) to the subsequent alterations in the law, the Author finding it distasteful to write, in

the style suited for oral delivery, matter not in fact intended to be used orally; but notes, with references to subsequent cases, have been added for the assistance of students.

But probably, to the student class of readers, the most valuable addition now made will be found to be Mr. Barber's statement on Equity Practice and Procedure, which is reprinted from the Parliamentary Papers, and to which the Author of the Lectures has appended some notes and references.

As part of the endeavour to improve the book for educational purposes, a Table of Cases has been prefixed.

13, NEW SQUARE, LINCOLN'S INN,

February 3, 1865.

PREFACE TO THE THIRD EDITION.

A NEW Edition of these Lectures having been called for, my first care was to ascertain whether, notwithstanding the legal decisions and statutory enactments of the last seven years, they could still be considered useful to those for whose information they were originally published.

The result of a careful reperusal of them was to satisfy me that, except in respect of the alterations introduced by the Married Women's Property Act, 1870, and those infused into the practice of the Court of Chancery by the 25th & 26th Vict., cap. 42 (Rolt's Act), the text might be treated as little affected by the lapse of time; and the Lectures have, therefore, been reprinted with notes explaining the effect of subsequent legislation and referring to the recent decisions applicable to the questions discussed.

An Elementary Lecture on the subject of "Fusion,"

delivered while the present Edition was passing through the press, has been added.

I have to thank my son, Mr. Edmund C. Haynes, Fellow of Queen's College, Cambridge, for assistance in correcting the press, and for useful hints as respects the notes.

F. O. HAYNES.

15, OLD BUILDINGS, LINCOLN'S INN,
January 1, 1873.

PREFACE TO THE FOURTH EDITION.

THE shortness of the period which has elapsed since the publication of the Third Edition of these Lectures would, but for the intermediate passing of the Supreme Court of Judicature Act, 1873, have caused the present edition to be little more than a reprint, with additional references to a few cases decided during the interval.

Looking, however, to that Act, which, though not yet in force, will doubtless become so towards the end of the year 1875, I have added notes calling attention to such of its provisions as seemed more particularly to bear upon the subjects discussed.

The lecture on "Fusion" has been expunged, as possessing no longer sufficient interest to warrant retaining it.

F. O. HAYNES.

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OUTLINES OF EQUITY.

LECTURE I.

GENTLEMEN,—The task which, at the invitation of the Council of the Incorporated Law Society, I have undertaken to perform, is one, the satisfactory and efficient fulfilment of which seems to me by no means easy. The limited extent of time afforded by twelve lectures of one hour each, and the vast range of the subject-matter, render condensation and selection alike necessary and difficult.

Where condensation is my aim, I shall doubtless appear, sometimes needlessly elementary to the more advanced students amongst you, and sometimes obscure to those who are beginners merely; and in dealing with particular heads of equity jurisdiction specially selected for consideration, the absence of a previous exposition of other heads closely connected with them must, I fear, occasionally lead to imperfect results.

Nor is the general question, *How to lecture usefully?* of easy solution (a). That lectures may be made an

(a) The following observations on the subject of oral teaching have lost their significance now that the voice has assumed the literal form; but they are retained because it would be difficult to expunge them without breaking the thread of the discourse; and possibly the reader may find them not altogether uninteresting.

efficient auxiliary in legal training can hardly be doubted, if for no other reason, at least as constituting a separate and distinct mode of instruction. Indeed, if I were asked by any one amongst you the surest means of acquiring legal knowledge, I should answer : All are valuable ; neglect none ; vary your modes of study. *Novelty* arrests the attention ; and attention firmly riveted results in impressions firmly fixed. After reading text-books, which, however useful, commonly leave but faint reminiscences, the full report of a single case, with all its incidents, may fix itself, *with the principle involved*, indelibly on the memory. So after theoretical study, in all its varieties, the perusal of a particular set of papers in practice, and the actual handling of the matter, will, for the first at least, impress upon the worker's mind tenfold more strongly than any mere theoretical reading could do, the points of law actually involved and considered. Again, the first arguments and judgments heard in open court, the earliest consultations of counsel which may be attended, convey lessons not easily forgotten. Every avenue, in fact, to legal, as to other, knowledge possesses, *cæteris paribus*, in proportion to its novelty, a greater prospect of fixing in our treacherous memories those principles which so readily elude us.

It must be understood that I am here dealing only with the question of the bare acquisition of sound legal knowledge ; an object most important in itself, but one which, when attained, forms part only of the practical lawyer's education. In practice, far more than sound legal knowledge is required. The habit of rejecting

rapidly those facts which are immaterial, and retaining for further consideration those which are or may be important, is, perhaps, more necessary for the despatch of business than even sound theoretical knowledge itself. In fact, theoretical knowledge must be made the means and not the end,—the handmaid and not the mistress. Many of you will, doubtless, find at first, when you proceed to the active exercise of your duties—and amongst these not a few of the most diligent and of the best read—that the perusal of a set of papers, or the hearing of a particular statement, will immediately suggest various heads of legal difficulty. You will then, perhaps, resort prematurely to your books, sift the law thoroughly, and sitting down again, discover, to your mortification, some trifling fact which renders nugatory (so far at least as respects the matter in hand) your elaborate legal investigation. I conceive, indeed, that to a young practitioner, fairly read, no better advice could be given on commencing practice than *this*:—“Avoid, as a general rule, considering the law of the case until you have thoroughly mastered the facts.”

But I am digressing rather. I was attempting to show that, in the acquisition of legal knowledge, novelty of mode formed an important aid. And it is chiefly on this account that I think “lectures” valuable. For, as compared with other means of instruction, it is obvious that they labour under some degree of disadvantage.

Socrates, in the “Phædrus,” is represented as ingeniously showing the imperfection of instruction conveyed by books, as compared with the oral instruction of the ancient philosophers.

He says :—" Writing is something like painting. " The creatures of the latter art *look* very like living " beings ; but if you ask them a question, they pre- " serve a solemn silence. Written discourses do the " same. You would fancy, by what they say, that they " had some sense in them ; but if you wish to learn, and " therefore interrogate them, they have only their first " answer to all questions. And when the discourse is " once written, it passes from hand to hand among all " sorts of persons, those who understand it and those " who cannot. It is not able to tell its story to those " only to whom it is suitable ; and when it is unjustly " criticised, it always needs its author to assist it, for " it cannot defend itself.

* * * * *

" There is another sort of discourse which is far better " and more potent than this.

" *Phædr.*—What is it ?

" *Soc.*—That which is written scientifically upon the " learner's mind. This is capable of defending itself, " and it can speak itself, or be silent, as it sees fit.

" *Phædr.*—You mean the real and living discourse " of the person who understands the subject, of which " discourse the written one may be called the picture.

" *Soc.*—Precisely so " (a).

It might have been retorted, though with less fair-
ness than now in the days of the printing-press,
" *Litera scripta manet.*" The written discourse remains
and may be referred to from time to time as occasion

(a) For a later translation of high authority, see Jowett's "Dialogues of Plato," vol. i. p. 611.

may require ; while the orally taught pupil, after he has retired from the presence of his oral instructor, must first re-demand from his memory the precise words of his teacher, and then weigh their value.

But, however this may be, it must be confessed that the modern lecturer can boast neither the advantage of that permanency which belongs to written instruction, nor the power of exposition and explanation so highly prized by the Athenian philosopher. The former advantage is denied to him by the very nature of his calling ; the latter, in the case of public lecturers at least, by the number of his audience.

The question still remains, What *can* be usefully accomplished by public lectures ? I should answer : that the first principles of any science may be introduced to the minds of the hearers more readily than by books merely ; that general conceptions of the subject-matter in hand may be conveyed (incomplete necessarily, because qualifications must be neglected, but) more vividly than could be gained from the introductory pages of a scientific work ; and that, by a somewhat bold generalization and *quasi*-popular handling of the subject, the interest of the hearers may be awakened to search for themselves whether these things are so. In my own case I shall be perfectly satisfied if, by hearing my lectures, gentlemen are induced to explore the mines of learning contained in Mr. Spence's work (*a*), and in the two other treatises mentioned at the foot of the prospectus (*b*). They will at once perceive how

(*a*) The Equitable Jurisdiction of the Court of Chancery.

(*b*) Story's Equity Jurisprudence, and Lewin on Trusts.

largely I have entered into the labours of those who have gone before me; but not, I can assure them, without labouring myself. Indeed, it is of the essence of legal study to take nothing for granted—to trace out laboriously to their original sources the knowledge or the error of those who have gone before. He who would learn law must plod, must dig. Would that, while conscious of some capacity for digging and plodding myself, I felt equally sure of my power of lecturing after the manner which, so far as I can judge, is alone likely to be useful.

Respecting the general plan of my lectures, I am not aware that I can add much to the information afforded by the prospectus already issued (*a*).

In every system of jurisprudence we have, (1.) the system itself; (2.) the functionaries by whom it is administered; and (3.) the procedure by which they administer it. Without some general information on *each* of these heads, it would obviously be impossible to pass to the more particular consideration of any one. This explains the selection of the subjects of my first three lectures. The next three are intended to present a somewhat more complete view of equity jurisprudence in general. The rest of the prospectus may be left to speak for itself.

Well, then, the subject of my present lecture is the general nature and extent of equity jurisprudence, and the classification of the different heads of equity.

And, first, what is *equity*, in the legal technical sense

(*a*) See "Table of Contents," which, as to the first nine Lectures, was copied from the "Prospectus."

of the word? Not, of course, the equity referred to in Sacred Writ, as "equity and every good path." That is not to be hoped for, nor can it be enforced in our present imperfect state. The man who, from vindictive motives, cuts off his son with a shilling, and leaves his property to strangers, abuses most grossly the rights conferred on him by the policy of our law, but does nothing that renders him accountable in equity. The man who, surrounded by every luxury, a *millionnaire* himself, should choose to allow to an aged father, formerly affluent, but now destitute, a pittance of say 15s. a week, would satisfy the positive enactments of the Poor Law, and be amenable to no court of equity. Equity, in the technical sense, is therefore at the utmost but a portion of equity or natural justice in the larger sense. There are many duties, many obligations (imperfect they are commonly called), which no civilised country attempts to enforce judicially. Between these and obligations which may be so enforced, there is a line of demarcation varying not very much in different countries. The non-enforceable portion of natural justice forms, therefore, no part of technical equity.

The next question is, Does technical equity or equity jurisprudence represent the whole of that portion of equity which may be enforced? Not so. A large portion of this enforceable part of equity lies within the competency of our courts of law. Equity, technically speaking, is that portion of equity in the larger sense, or *natural justice*, which, though of such a nature as to admit properly of its being judicially

enforced, was omitted to be enforced by our common law courts—an omission which was supplied by the Court of Chancery. The distinction between equity in the technical sense and law, is truly matter of *history* and not matter of *substance*.

The strongest argument in support of this assertion is that derived from the fact, that in our country alone (I except, of course, such of the American states as have inherited or adopted our equity system) are to be found the double jurisdictions in law and equity. The short sum of the matter is this,—that the Court of Chancery recognises certain rights and applies certain remedies, which the courts of law might have equally recognised and applied, but did not (*a*).

But why, I hear some of you ask, did the common law courts thus fall short in the performance of their judicial duties? Here, too, the answer is matter of history. According to the common law, every species of civil wrong was supposed to fall within some particular class, and for each class an appropriate writ existed, or was supposed to exist. The writ was (as you know it still is), in common law actions, the first step. Thus, if a man had suffered an injury, it was not competent to him to bring before the court of law the facts of the case, leaving it to the court to say whether the case was one deserving redress; but he

(*a*) The Court of Chancery is by the Judicature Act, 1873, now merged into the Supreme Court, and though it is partially revived in the form of the Chancery Division of the High Court, all the other Divisions of the High Court are now bound to recognise equitable rights, and, subject to the arrangements for the distribution of business, made by the 34th section the Act, may equally apply equitable remedies.

had first to determine within what class of wrong his case fell, and then apply for the appropriate writ.

The evil effects of this system of procedure were mainly two.

First. Even where the facts were such as to bring the case of wrong within some one of the classes already recognised as remediable at common law, the injured suitor was exposed to the risk of selecting an improper writ, and failing in his action on that account. This, indeed, was a fertile source of injustice in common law proceedings, even within the last few years ; in fact, until the Common Law Procedure Act of 1852, which enacted “ that it should not be necessary to mention any form of action in the writ of summons ” (a). Thus, before the late Procedure Act, it often happened that a man sued in “ debt ” when he ought to have sued in “ assumpsit,” or in “ trespass ” when he ought to have selected “ case.” He incurred, perhaps, great expense ; and although proving at the trial facts showing him to be entitled to a common law remedy, yet failed because he had selected the wrong form of action. Take as an illustration the case of *Sharrod v. London and North-Western Railway Company* (b). There the action was one against a railway company for running over some sheep with a railway engine. The sheep had strayed on to the railway through defect of fences ; and there can be little doubt, though the report does not expressly so state, that the fences were, in fact, fences which the company was bound to keep in

(a) 15 & 16 Vict. cap. 76, s. 3.

(b) 4 Exchequer R. 580.

repair, and that the owner of the sheep had a substantial right of action against the company. The plaintiff's legal advisers brought trespass. It was held, that *trespass* would not lie ; that if the cattle had a right to be on the railway, the remedy was by an action on the case for causing the engine to be driven in such a way as to interfere with that right ; that if the cattle were altogether wrong-doers, there was no neglect or misconduct for which the company were responsible ; but that if the cattle escaped through defect of fences which the company should have kept up, their damage was consequent on that wrong, and recoverable in an action on the case against the company, for letting their fences be incomplete, or out of repair. In this case there can be hardly any reasonable doubt but that if the plaintiff had been allowed simply to state the facts of his wrong, apart from any technical form of action, and to support that statement by evidence, he must have succeeded against the railway company at the outset, instead of being obliged to resort (assuming him to have had the courage to do so) to the costly expedient of a second action.

But the injustice thus occasioned by the necessity for selecting a form of writ, even where the wrong was plainly one of common law cognisance, falls strictly within the pale of the common law ; and perhaps I have already devoted too much time to the consideration of an evil attaching to the old common law procedure, which, after all, is only indirectly

connected with the subject of my present lecture, viz., Equity (*a*).

Secondly. The other evil alluded to—and it is with this one that we are concerned, as having, in my opinion, mainly given rise to our equity jurisprudence—was the general cramping operation of the common law procedure by writ, in the instances of those civil wrongs which did not fall distinctly within any ascertained common law class. After selecting his form of action, the plaintiff might fail, not from having made an erroneous selection, but because the wrong done was of a class not referable to any hitherto known class of remedy. In this case there was an absolute denial of justice. The plaintiff would have equally failed, had he sued in any other form. And frequently a man might abstain from suing altogether, feeling it to be hopeless to select a form of action suitable to his grievance. The heavy fetters of such a procedure could not fail to be early felt. The system was, in fact, incapable of expansion, or of adaptation to the growing wants of society. So long ago as the

(*a*) Rule 2 of the Schedule to the Judicature Act, 1873, providing that “every action shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required,” would have revived, though in a minor degree, the vice of the old common law procedure, by requiring a plaintiff to define his cause of action by his writ, instead of leaving him simply to state his case. The Rules of the Supreme Court, 1875, have neutralized this objectionable requirement by providing that in the indorsement “it shall not be essential to set forth the precise ground of complaint or the precise remedy or relief,” and by conferring a power to amend the indorsement, “so as to extend it to any other cause of action, or any additional remedy or relief,” see Order III. rule 2.

thirteenth year of Edward the First's reign, a remedy was attempted. At that time actions at law in fact commenced with an original writ sued out in Chancery; though at a later date the common law courts contrived practically to dispense with the necessity for suing out these original writs. The drawing up of these writs was part of the business of the clerks (better known afterwards as the Masters) in Chancery. An attempt was made to mitigate the latter of the two evils, which I have just explained, by giving a larger discretion, and enjoining a greater activity in the framing of new writs. It was accordingly enacted (*a*), that "whensoever from henceforth it shall fortune in "the Chancery, that in one case a writ is found, and in "like case falling under like law and requiring like "remedy is found none, the clerks of the Chancery "shall agree in making the writ; or the plaintiffs "may adjourn it until the next Parliament, and let the "cases be written in which they cannot agree, and let "them refer them unto the next Parliament, and by "agreement of men learned in the law, let a writ be "made, lest it should happen that the court should "long time fail to minister justice unto com- "plainants."

This enactment, though well intended, proved wholly inadequate. The Clerks in Chancery made little or no use of the new powers conferred. It was hardly to be expected they should. They were ecclesiastics, knowing little of the common law. There was no encou-

(a) 13 Edward I. stat. 1, cap. 24.

agement to them to make any attempt to frame new writs, since the common law courts were the sole judges of the validity of these writs when framed. And it cannot be doubted that any new writs adequate to newly-occurring emergencies, based as they must have been on the Roman law, would immediately have aroused the jealousy of the common law judges, and have been treated as invalid.

The Act, therefore, remained, to a considerable extent, a dead letter; and, but for some interposition, right and justice must have been stifled by a system of procedure which Sir William Blackstone seems to have thought deserving of eulogium (*a*).

The common law courts thus falling short in the administration of justice, those who suffered wrongs for which the common law afforded no redress applied either to the King in Parliament or to the King in Council, who referred these matters to the Chancellor. Thence grew up a practice of applying to the Chancellor directly, who, perceiving how hopeless it would be to attempt to remedy the wrongs brought before him by framing new writs, took upon himself to apply an immediate remedy, by ordering the defendant to do, and compelling him to do, what he (the Chancellor) considered to be right in equity and in conscience.

Such, according to the best of my research, is the origin of our equity jurisprudence.

Considering that origin, it is hardly to be expected that either its nature or extent should be capable of

(*a*) Bl. Com. vol. iii. 183, 184.

any concise general definition. To convey an accurate notion of the nature and extent of equity jurisprudence, requires little less than a statement of the cases in which, and the circumstances under which, the Court of Chancery interposes to mitigate the hardships and inconveniences of the common law. Indeed, on referring to the text books, you will observe wide differences of opinion amongst the most eminent jurists respecting the principles upon which equity interposes—differences which can be accounted for only by admitting that the doctrines and principles of the Court have varied from time to time. Thus, you will find Lord Bacon, Mr. Ballow, in the treatise known as “Fonblanque on Equity,” and the earlier theoretical writers, attributing to the equity jurisdiction far larger and more uncontrolled powers than later writers have been willing or able to recognise. Lord Bacon, for instance, in his “De Augmentis Scientiarum,” liber 8, aphorism 35, assigns to the courts of equity the power both of mitigating the rigour and supplying the defects of the law. His words are, “Habeant similiter curiæ
“*prætoriae potestatem tam subveniendi contra rigorem*
“*legis quam supplendi defectum legis.*” And there can, I think, be no doubt that the early foundations of our equity system were laid by chancellors who assumed to themselves and exercised powers fully as large as that ascribed by Lord Bacon. On the other hand, the jurists of more recent times, writing when the edifice had already risen into something like shape and proportion, have denied the existence of those larger principles of jurisdiction. Sir William Black-

stone observes,—“ In the first place it is said, that it “ is the business of a court of equity to abate the “ rigour of the common law. But no such power is “ contended for.” And the learned writer proceeds to give various instances of common law hardship, which the equity courts had not interfered to alleviate (a). These discrepant views represent truly the equity doctrines of two different epochs. For the first *creation* of the equity system, principles of jurisdiction as extensive as those enunciated by Lord Bacon were absolutely necessary ; for the mere *development* of it, more moderate powers were sufficient.

The history of the growth and development of equity jurisdiction is, indeed, by no means, as sometimes supposed, that of a gradual, slow encroachment. On the contrary, turning to the earliest records, we see, at first, the chancellors trying apparently to redress every grievance of whatever nature, which would otherwise be remediless ; while the labours of the more recent judges consisted, not merely in developing heads of equity already founded, but in pruning the luxuriance of the earlier jurisdiction (b).

(a) Bl. Com. vol. iii. 430.

(b) At the time of the passing of the Judicature Act, 1873, it was argued, not without force, that the tendency of the fusion effected by that Act must be to arrest the fair natural development of Equity Rules and Doctrines, by committing the exposition and application of them to Judges unfamiliar with them. The apprehension on this head has not as yet been realised, but the limited time which has elapsed since the Act came into operation, and the fact that the distribution of business under it is liable at any time to modification, seem to make any positive expression of opinion on the subject premature. The danger, however (if any), must, it is conceived, lessen every year.

In illustration of this position, let me turn to the book which I now take up, and which contains the most authentic information we possess respecting the early proceedings in Chancery. It is the first volume, "Calendars in Chancery of Queen Elizabeth," printed by order of the Record Commissioners. Prefixed to the Calendars is contained a selection of bills and petitions, of dates anterior to Queen Elizabeth's reign, accompanied, in the later instances, by the answers, replications, and depositions of the witnesses. The general character of these early proceedings is in the preface to the publication thus described: "Most of
" these ancient petitions appear to have been presented
" in consequence of assaults and trespasses and a
" variety of outrages which were cognisable at common
" law, but for which the party complaining was unable
" to obtain redress, in consequence of the maintenance
" and protection afforded to his adversary by some
" powerful baron, or by the sheriff, or by some officer
" of the county in which they occurred." I need hardly observe to the youngest beginner amongst you that any such cause for coming into equity has long since ceased to exist; and even if any such in fact existed, it would clearly at the present day constitute no ground for equitable interposition.

The latitude of jurisdiction assumed by the early chancellors, will, however, be best shown by the selection of a few instances from the book before me (a).

(a) The following cases were then read :—

1stly, p. xx.—"Kymburley v. Goldsmith. A common case of action for non-delivery of woad."

But, in truth, we find considerable inaccuracy of opinion, respecting the true functions of equity, prevailing at a much later date than that of these precedents. Thus, the celebrated confidential adviser of Henry the Seventh, Archbishop Morton (*a*), appears, according to a report in the Year-Books, to have denied even the distinction between "technical equity" and "equity in the sense of natural justice." The report of the case, which is noticed by both Mr. Spence and Lord Campbell, is rather curious. It appears that one of two executors, colluding with a debtor to the testator's estate, had released the debtor. The co-executor filed a bill against the executor and the debtor. The Chancellor was disposed to give relief. Fineux, counsel for the defendant, observes, "that
 "there is the law of the land for many things, and
 "that many things are tried in Chancery which are
 "not remediable at common law, and some are merely
 "matter of conscience between a man and his confessor," thus pointing out accurately the distinctions

2dly, p. xli.—"Appilgarth, widow, *v.* Sergeantson. Bill complaining that defendant, having obtained a sum of money of plaintiff, giving her to understand he intended to marry her, has married another woman, and refuses to return the money." See this case, Appendix A.

3rdly, p. xxiv.—"Henry Hoigges *v.* John Harry. Bill by plaintiff, an attorney, to restrain the defendant, a priest, from practising witchcraft against him." See this case, Appendix B.

The two first cases obviously present no ground for equitable interposition. The third, viewing witchcraft as a reality, was in substance a bill for protection against a criminal outrage, a species of suit wholly inadmissible at the present day.

(*a*) Bacon, in his Essay on Counsel, says that Henry the Seventh, in his greatest business, imparted himself to none except Morton and Fox.

between law, equity, and religion. But the Chancellor retorts: "Sir, I know that every law is, or ought to be, according to the law of God" (ignoring thus altogether any distinction between law and religion); and then, merging completely the chancellor in the archbishop, he continues: "and the law of God is, that an executor, who is evilly disposed, shall not waste all the goods, &c. And I know well, that if he do so, and do not make amends if he have the power, il sera damne in hell." And then the Chancellor proceeds to lay down some rather unsound law (a). But I would recommend those of my hearers who would wish clearly to understand and appreciate how the wave of Chancery jurisdiction first swelled and threatened to advance beyond due bounds, and then gradually receded, to read carefully that portion of Mr. Spence's work which treats of the now obsolete jurisdiction of the Court of Chancery (b). I am not aware that the subject has been systematically considered elsewhere.

If, then, it be historically true that our present equity jurisdiction is only the ultimate result of the development of principles varying in different centuries, it must obviously be impossible to convey any satisfactory view of equity which does not, in substance, amount to an enumeration of the particular heads of jurisprudence gradually evolved by the labours of our successive chancellors.

(a) Year Book, 4 Henry VII. fo. 5.

(b) Spence's Equitable Jurisdiction, vol. i. p. 684.

But some faint general notion of the functions and limits of equity may perhaps be conveyed by enunciating, and elucidating by example, a few of the leading maxims or principles of equity. I will select four—three of an enabling, and the fourth of a restrictive character.

1. No wrong without a remedy.
2. Equity regards the substance or spirit, and not the letter merely.
3. Equity acts "*in personam*."
4. Equity follows the Law.

1. No wrong without a remedy. This is the chief root of our equity jurisdiction. You have already seen the over-luxuriance of the earlier shoots which sprang from it. The only limit, indeed, to its creative power, is the barrier interposed between itself and that portion of natural justice which, as already indicated, falls within the province of morals and religion only. To this maxim, for instance, we owe our vast system of uses and trusts. You are probably aware that, previously to the earliest records in the book before me (a) (the earliest are of the date of Richard the Second), a practice had grown up (under circumstances which time does not permit me to detail) of the legal owners of lands conveying them to third parties, who undertook to hold them for certain uses. The common law courts steadfastly refused to recognise in any way the engagements entered into by those (feoffees to uses, as they were called) to whom the land

(a) The Calendars of Proceedings, vol. i.

had been so conveyed (a). The chancellors, on the other hand, held that these engagements were binding on the consciences of the feoffees to uses, and that they (the feoffees) were compellable in equity to perform them. Thus was the foundation laid of the great system of trusts, which, by itself, constitutes the larger portion of the entirety of equity jurisdiction.

This was, perhaps, the boldest application of the maxim that the history of our equity jurisprudence tells of; and, as might be expected, it was one of early

(a) This is well illustrated by the general immunity of trustees from criminal liability at common law in respect of breaches of trust, whether fraudulent or quasi-felonious. Until quite recently (1857) an ordinary trustee of (say) 30,000*l.* consols might sell the stock and misappropriate the proceeds without incurring criminal punishment. The previous legislation on the subject had been directed against particular persons, such as servants, bankers, factors, &c. The law on this point is humorously satirized by Fielding in his "*Amelia*," where Betty, having purloined her mistress's wardrobe, is brought before the Justice, and Booth, in charging her, says reproachfully, "Nay, you are not only guilty of felony, but of a felonious breach of trust, for you know everything you had was entrusted to your care."

The story then continues thus :—

Now it happened, by very great accident, that the Justice, before whom the girl was brought, understood the law. Turning, therefore, to Booth, he said, "Do you say, sir, that this girl was entrusted with the shifts?"

"Yes, sir," said Booth, "she was entrusted with everything."

"And you will swear that the goods stolen," said the Justice, "are worth forty shillings?"

"No, indeed, sir," answered Booth; "nor that they are worth thirty either."

"Then, sir," cries the Justice, "the girl cannot be guilty of felony."

"How, sir," said Booth, "is it not a breach of trust? and is not breach of trust felony, and the worst felony, too?"

"No, sir," answered the Justice, "a breach of trust is no crime in our law, unless it be in a servant; and then the Act of Parliament requires the goods taken to be of the value of forty shillings."

date. Let me read to you from the volume before me one of the earliest published instances of a resort to equity which falls under this head of jurisdiction (a).

2. Equity regards the spirit, and not the letter.

The popular belief, that the law exacts a literal fulfilment of contracts, has ever been deeply rooted. We trace it distinctly in the drama and in works of fiction. Perhaps one of the most remarkable instances is that of Shylock's bond. The penalty of the bond was, as you recollect,—

“A pound of flesh, to be by him cut off
Nearest the merchant's heart.”

The money not being paid on the very day, the Jew claims the penalty. Double the amount lent is offered; but, being tendered after the appointed time, it comes too late, and is refused.

And how is the intended victim rescued? By the merest verbal quibble. Portia says:—

“Tarry a little ;—there is something else.—
This bond doth give thee here no jot of blood ;
The words expressly are, *a pound of flesh* :
Take then thy bond, take thou thy pound of flesh ;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.”

Gentlemen, I should be sorry to profane Shakspeare, or to approach the creations of his genius in the same spirit that I should a report in Meeson and Welsby. Considerable latitude is to be allowed to the dramatist; but when I see Antonio saved by a species of construc-

(a) The case of *Dodd v. Browing*, Appendix C, was then read.

tion, according to which, if a man contracted for leave to cut a slice of melon, he would be deprived of the benefit of his contract unless he had stipulated, in so many words, for the incidental spilling of the juice, one cannot help recognising in the fiction of the immortal poet an intensified representation of the popular faith, that the *law* regarded the *letter* and not the *spirit*.

As to the tender coming too late, that was in strict historical accordance with the law. At common law if a bond was once forfeited by non-payment of principal and interest on the day stipulated, the whole penalty must have been paid. In these cases of forfeited bonds, before the reigns of William the Third and Anne, when the Legislature interfered to regulate the proceedings at common law (*a*), the only remedy for an obligor who had allowed the time for payment to elapse, was to file a bill in equity offering payment of principal and interest. It is clear that, had the scene of Shakespeare's play been laid in England, and not in Venice, the proper advice for Portia to have given, would have been, to file a bill in Chancery. But it must be admitted that the play would not have been improved.

The ground upon which the interference of the equity courts is now rested in these cases of forfeited bonds, is the maxim above referred to—that equity regards the spirit, not the letter; that in substance the bond was intended as a security merely; that the precise day of payment was immaterial.

To the same maxim also is to be referred the equity

(a) See 8 & 9 Will. III. cap. 11, s. 8; 4 & 5 Anne, cap. 16, ss. 12, 13.

jurisdiction in allowing the redemption of mortgaged lands after the day stipulated by the contract. You are aware, doubtless, that in the ordinary form of mortgage the borrower conveys his property absolutely to the lender, subject to a stipulation that, upon payment of the money borrowed and interest, *on a particular day*, the property shall be reconveyed to the borrower. In the older form of mortgage, the stipulation commonly was, that upon payment on the day named, the deed should be void, or that the borrower should be at liberty to re-enter. The common law courts, construing these conditions with the utmost strictness, held that, unless the money were paid on the very day, the estate was lost to the mortgagor. The Court of Chancery, on the other hand, looking to the spirit of the transaction, held that the land was, in substance, a pledge merely, and that time was not of the essence of the bargain; and that, therefore, the mortgagor should be allowed to come after the time fixed and pay the principal and interest then due, and obtain back his estate.

While, however, we value to its full extent the maxim that the spirit and not the letter is to be regarded, it must be confessed that the heads of equity which are attributed to the application of this maxim are those which it is the least easy logically to justify. The ordinary money bond, for example, must, in its earliest use, have been meant to represent the true contract between the parties, and, if deliberately entered into, no valid ground for interference seems to exist (a).

(a) In *Preston v. Dania*, L. R. 8 Exch. 19, Bramwell, B., thus expresses

In fact, to justify the equity jurisdiction, we must suppose the existence of an epoch intermediate between the first use of the bonds and the exercise of the jurisdiction, and during which these money bonds (which originally truly represented the contract between the parties) came to be used merely as a convenient form of security; and I am not aware that legal history warrants such a supposition.

It is, indeed, extremely probable that a jurisdiction now justified upon the principle of the above maxim, derived its growth originally from the interposition of the court in cases where accident in allowing the day of payment to pass by, or some other circumstance of hardship, induced the equity judge to mitigate the literal rigour of the contract (a).

3. Equity acts "*in personam*." This is an important peculiarity. The remedy to which, in cases of breach of contract, the common law actions all tended was "pecuniary compensation." The aim of the equity courts was to make the defaulter do what was right. The thing to be done might or might not be the payment of a sum of money; but the *modus operandi* was to order the doing of it, and attach the defaulter's person until he did what was ordered. Hence arose the salutary equity jurisdiction in respect

himself on this point: "Look for a moment at the history of these bonds. "Originally the penal sum mentioned in them was recoverable. Then the "Courts of Equity, unfortunately as I think, established a practice of "relieving the obligor from payment of the penalty—of relieving him, "that is to say, from the obligation of doing what he had contracted to "do."

(a) See Spence's Equitable Jurisd. vol. i. p. 623—630.

of wrongs which do not admit of pecuniary compensation. A man agreed to sell a field possessing special attractions for the purchaser, and subsequently refused to convey it. The Court of Equity decreed him to fulfil his contract—to perform it specifically, as we say—and justice was satisfied.

Hence, again, proceeded the vast jurisdiction by injunction (a), assumed, and after many a struggle successfully maintained, by equity—a jurisdiction which practically conferred on the equity courts the power of modifying the effect of the decisions of other tribunals. Thus, a man, in assertion of his legal right, sued in the Common Law Court. His opponent came to the Court of Equity, and said, “Although the strict “legal right is on the other side, there are equitable “circumstances in this case which ought to deprive “my assailant of the right of suing me.” And the Equity Court, if it agreed in this view, simply ordered the plaintiff at law not to sue, and put him in prison if he persisted.

Hence, again, the equity jurisdiction, even where the property in dispute was situate out of England, as in Ireland, Scotland, or the colonies. Hence, too, paradoxical as it may seem, the virtual trusteeship which the Court acquires over the very property of parties litigant; the Court saying to the executor, or other person bound to distribute the property,—“You

(a) Now abolished; see Judicature Act, 1873, sect. 24, sub-sect. 5; though the statutory power of the Court of Bankruptcy and of the County Courts sitting in bankruptcy to restrain proceedings in other Courts, is unaffected by the Act; see *Ex parte Ditton*, 1 Ch. D. 557.

“ought to distribute according to the true equitable rights, and we *will order you to do so*. Meanwhile, “until the rights are ascertained, you shall pay the “money into the bank for safe keeping.”

4. To pass to the last maxim mentioned, “Equity follows the Law” (a). This, as intimated, is restrictive in its operation. It is the maxim chiefly referred to for the purpose of keeping the equity jurisdiction within moderate bounds. It may be said to have a double meaning and operation. Thus, first, “Equity follows the Law,” in the sense of *obeying* it—conforming to its general rules and policy, whether contained in the common or in the statute law. Perhaps one of the best instances of the application of the maxim in this first sense is afforded by the decision of Lord Talbot, in the case of *Heard v. Stamford* (b). You are aware that, if a man marry a woman who is indebted, he thereby makes himself liable at law for all her debts. He may be sued immediately after marriage (c). But this liability

(a) The Judicature Act, 1873, sect. 24, subsect. 11, provides that in case of conflict or variance between the rules of Equity, and the rules of the Common Law, with reference to the same matter, the rules of Equity shall prevail; but this provision, it is conceived, does not affect the operation of the maxim discussed in the text.

(b) Cases Temp. Talbot, 173.

(c) As to women married after August 9th, 1870, the law was altered by the Married Women's Property Act (33 & 34 Vict. c. 93), the 12th section of which enacts as follows :—“A husband shall not, by reason of any “marriage which shall take place after this Act has come into operation, be “liable for the debts of his wife contracted before marriage; but the wife “shall be liable to be sued for, and any property belonging to her for her “separate use shall be liable to satisfy, such debts as if she had continued “unmarried.”

This section agrees in principle with the decision, antecedent to the

of the husband for the debts of his wife contracted before marriage is one which ceases at the wife's death. In the case under consideration a wife indebted before marriage brought a large fortune to her husband, and then died. It was contended that the husband, having received her fortune, was liable, in equity (though not at law), to pay her debts contracted before coverture. But the Lord Chancellor held otherwise, saying, "There are instances, indeed, in which a court of

Act, of V.-C. Malins (*Chubb v. Stretch*, L. R. 9 Eq. 555), that where the creditor's right of action for the wife's debt is destroyed by the husband's bankruptcy, property settled by the wife on her marriage to her separate use is liable.

The effect of the enactment, however, taken in connection with the other provisions of the Act of 1870, was seriously to prejudice the interests of creditors, for the Act, while containing provisions making certain *after-acquired* property of a married woman her separate estate, left the rights of the husband in respect of the wife's property *at the time of marriage* untouched, so that upon a husband marrying (without settlement) a wealthy but indebted wife, he might acquire her property, and the creditors would be without remedy during the coverture, just as they were, in *Heard v. Stamford*, held so to be after the wife's death.

To remedy this injustice an amending Act (37 & 38 Vict. c. 50) was passed. By this Act, the enactment of 1870, that a husband shall not be liable for the debts of his wife contracted before marriage is repealed as respects marriages taking place after the passing of the amending Act (*i.e.*, after 30th July, 1874), and a husband and wife married after that date may be jointly sued for any such debt. In any such action, and also in any action for damages by reason of *tort* committed by the wife before marriage, or for breach of contract made by the wife before marriage, the husband will be liable to the extent of the various descriptions of property specified in the Act as being assets, being in substance the property derived by him through his wife, or transferred by her in contemplation of marriage.

The result is that the remedies of creditors in respect of the ante-nuptial debts, torts, or contracts of a married woman, vary according as the marriage took place before August 10, 1870, between that date and July 30th, 1874, both inclusive, or after July 30th, 1874.

“ equity gives a remedy, where the law gives none ;
“ but where a particular remedy is given by the law,
“ and that remedy bounded and circumscribed by par-
“ ticular rules, it would be very improper for this court
“ to take it up where the law leaves it, and extend it
“ farther than the law allows.”

Again, “ Equity follows the Law ” in the sense of applying to equitable estates and interests the same rules by which at common law legal estates and interests of a similar kind are governed. Thus, Equity having first, by the exercise of its creative power, called into existence the system of equitable estates, subsequently, acting upon the principle expressed by the above maxim, determined that these estates should partake, as nearly as possible, of the quality of the corresponding legal estates. Thus a use in fee descended according to the same rule, the husband was entitled to curtesy under the same circumstances, and so on, as in the case of the legal fee. There was an anomaly in respect of dower, which I do not now enter upon. You will find a most able exposition of the force of the maxim (in the sense which I am now alluding to) in the celebrated judgment of Sir Joseph Jekyll, in *Cowper v. Cowper* (a), in which case he decided (most reluctantly) that an equitable interest in fee, which had vested in the infant son by the first marriage of Lord Chancellor Cowper, should descend to his cousin of the whole-blood, instead of to his brother of the half-blood, the Chancellor’s infant son by a

(a) 2 Peere Williams, 720. The particular passage extracted will be found at p. 752.

second marriage (a). The passage is quoted in many of the text-books; but I cannot forbear reading it:—

“The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri* (b), yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat*; and as it is said in *Rooke’s case*, 5 Rep. 99 b., that discretion is a science not to act arbitrarily according to men’s wills and private affections, so the discretion which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.”

Having now pointed out to you what I consider to have been the origin of our equity jurisprudence—

(a) For the modern alteration in the law respecting descent to the half-blood, see 3 & 4 W. IV. cap. 106, s. 9.

(b) See Bacon, “*De Augmentis*,” lib. viii. aph. 32, where, speaking of the *curiæ prætoris*, he says, “*Quæ statuunt ex arbitrio boni viri.*”

having shown, as I conceive, the impossibility of defining adequately its nature and extent by any general statement and description, or indeed in any other way than by a catalogue of the various heads of equity—having attempted nevertheless to convey some kind of imperfect notion of its nature and extent—it remains that I should say a few words respecting the classification of the various heads of equity jurisdiction.

And here it is to be observed, at the outset, that these various heads of equity jurisdiction being merely the fruits of the shortcomings of the courts of common law, it might be expected that what is not a system in itself (though one is in the habit of so calling it), but only a supplement to the imperfections of another system, should hardly allow of a very methodical classification—and such is the fact. We can classify the heads of equity jurisdiction only by reference in some way to the defects of the common law jurisdiction which it supplements. In the “Manual of Equity Jurisprudence” of Mr. Josiah Smith, the different heads of equity are grouped according to the nature of the relief afforded, or of the functions performed by the court. The titles in Mr. Smith’s book are “Remedial Equity,” “Executive Equity,” “Adjustive Equity,” “Protective Equity,” and “Auxiliary Equity.” This arrangement of the subject is, however, so purely scientific, that I prefer adopting the more usual division into *Exclusive, Concurrent, and Auxiliary*; i.e. under the first title are to be ranged all those heads in respect of which the courts of equity have exclusive jurisdiction; under the second, those in which their jurisdiction is

concurrent with that of the common law courts ; under the third, those in which courts of equity, acting in aid merely of the common law courts, supply some additional remedy which the latter are inadequate to afford. This arrangement, though incomplete in some respects, possesses the great advantage of an immediate tangible connection with the history of the subject itself. Does the case fall within the first class?—then it was one of those in which the common law afforded no relief. Within the second?—then the relief in equity was probably more perfect, more convenient. Within the third?—then the partial help of equity, supplying some want of the common law, but not otherwise assuming jurisdiction, was needed and granted. But this arrangement has another and far greater advantage. It is of practical utility. For in practice the important question (in many cases, at least) is not as to the character of the relief afforded by the court, viz., whether it be remedial, adjustive, or protective, but whether there is a remedy in equity or not ; and if there be one, whether the suitor has a choice of proceeding at law or in equity ; and the ordinary classification tends to call the attention forcibly to these main points (a). For my own part, without wishing

(a) The practical question now is whether the action is one which should be brought in the Chancery Division of the High Court, or whether the suitor has an option. The 34th section of the Judicature Act, 1873, while assigning to the Chancery Division of the High Court all matters in which the Court of Chancery had exclusive jurisdiction by statute, makes no similar assignment to that division of matters in which the Court of Chancery had exclusive jurisdiction otherwise than by statute. It assigns to the Chancery Division various specially mentioned heads of non-statutory jurisdiction ; and as to matters not so mentioned, the suitor, by

to underrate the importance of a scientific analysis of the heads of equity, in reference to the character of relief afforded, I would strongly advise you to adopt the usual arrangement in the acquisition of equity knowledge.

Before parting with this subject, let me allude to a classification, not of heads of equity jurisprudence, but of the general business of the Court of Chancery, which it is of extreme importance that you should, as men of business, appreciate thoroughly. The popular notion of the Court of Chancery is, that it is purely concerned with litigation. Nothing can be farther from the fact. A large, perhaps the larger, portion of the business of the Court is purely administrative, the residue only litigious. Thus, an intestate dies, a bill is filed, his property is realised, his creditors are paid, and the residue is distributed under the direction of the Court. In such a case, in the absence of any dispute respecting the next of kin or heir at law, the Court merely performs the functions of a trustee. So when a testator dies, the suit for the administration of his estate is frequently litigious to some very trifling extent only.

It is much to be regretted, that, amidst the general outcry and obloquy to which the Court of Chancery has been exposed, this distinction should have been so frequently overlooked, and in some cases, I fear, wilfully put out of sight.

section 35, repealed by the Judicature Act, 1875, but re-enacted in substance by section 11 of that Act, may select either the Chancery Division or one of the Common Law Divisions.

Chancery suits for the administration of property bequeathed by a testator to some half-dozen children for their lives, and after their respective deaths to their children at twenty-one, have been represented as owing their vitality, not to the happy health of the tenants for life, whose property has been well taken care of, but to the careless indolence or perverse ingenuity of judge, counsel, solicitors, and officers of the Court.

When some educated people are found imbibing from the works of fiction of a well-known talented author the notion that Chancery martyrs still exist, and that Chancery is not a mere ordinary Circumlocution Office (to adopt the author's phrase), but circumlocution of malice prepense, it is well that you, gentlemen, should at least be able, in case of need, to point out the broad distinction between the litigious and administrative business of the Court, and to refer to its true causes the longevity of a large proportion of our Chancery suits.

I must now conclude. This, my first lecture, has, I confess, fallen short of what I had hoped to accomplish when I drew up my prospectus. I had thought then to have embodied in it a connected historical sketch of the different heads of equity. It, however, soon became evident to me that to do this well would have required far more time than I could command. I regret it extremely. The importance of studying the jurisprudence of equity historically, has, I think, hardly been appreciated. I spoke at the outset of the advantage of varying your modes of learning; let me recom-

mend, as a mode of acquiring a knowledge of equity, one which I believe you will find both interesting and profitable. Take Lord Campbell's "Lives of the Chancellors." Begin (say) with the Life of Lord Nottingham. Read first the life of a Chancellor, and then turn to the reports of his more important decisions. Lord Campbell's biographies will give you some information respecting the legal performances of each chancellor and the books in which they are to be found recorded; and I am much mistaken if you do not find this combination of history, biography, and equity impart a new zest to your studies.

LECTURE IV. (a)

THE task to be performed, or at least attempted, by me in this lecture, is to give a "brief review of those heads of equity jurisprudence, in which the court exercises an *exclusive* jurisdiction."

These words are, perhaps, not altogether free from ambiguity, and seem to need some slight elucidation at the outset.

Whenever courts of equity deal with equitable rights wholly unrecognised by courts of law, then, without doubt, the jurisdiction is exclusive.

But there are cases in which, though the *right* is recognised equally by the court of law and by the court of equity, the latter court alone affords an adequate *remedy*; while the class of cases being frequently described by the name of the particular equitable remedy, it might seem at first sight to constitute a head of *exclusive* equitable jurisdiction.

(a) Lecture II. containing an account of the general history and constitution of the Courts by which Equity jurisprudence was administered at the time when the Lectures were delivered, and Lecture III. containing a general outline of a suit in Equity, are omitted, as not possessing sufficient interest to warrant their retention since the alterations introduced by the Judicature Acts, 1873 and 1875.

Thus, take "specific performance." To enforce the performance "*in specie*" of certain classes of contracts belongs to courts of equity only. *Specific performance*, therefore, might appear to be a head of *exclusive jurisdiction* in equity. On the other hand, however, it is perfectly clear, that where a contract has been entered into of a class conferring a right to specific performance in equity, the courts of law recognise the *mere right* to a performance of a contract, just as much as the court of equity. The real difference consists in the remedy applied. The court of law, upon the right being withheld, merely says: "The contract has been broken, and "we will give the injured party damages." The court of equity says: "The injured party has a right, if he so "prefer, to treat the contract as subsisting, and to insist "on its being actually performed." So far, therefore, as respects *rights* under the contract, the court of equity has *concurrent* jurisdiction only. What it does is, to afford a remedy peculiarly and exclusively its own; which, in certain cases, is the only satisfactory one.

Assume as an illustration, the ordinary instance of a contract for sale of land and deposit paid by the purchaser. Either the purchaser or the vendor may sue, *either* in equity for specific performance, *or* at law for breach of the contract. To the purchaser who wants the land, an action at law would be useless; while the remedy in equity is all-sufficient. The vendor, on the other hand, should there be a clause forfeiting the deposit in the events which have happened, may find it to be for his interest to treat the contract as a broken

and not a subsisting contract, retaining the deposit as forfeited, and suing at law, if need be, for any damages which he may have sustained by reason of its breach. Thus the jurisdiction, in reference to the contract and to the rights of the parties thereunder, is really *concurrent* only.

It is, perhaps, of no very great importance whether we treat specific performance and analogous heads of equity jurisdiction as falling within the *exclusive* or the *concurrent* jurisdiction of the court, provided our conceptions respecting them be really accurate; but I would state, for the sake of clearness, that I propose including them under the division of *concurrent jurisdiction*. I would add further, that *partition* being historically, though not in fact now, a head of concurrent jurisdiction, it will be treated of under that title.

Excluding, then, the heads of jurisdiction adverted to, the instances in which courts of equity exercise an *exclusive jurisdiction* strictly speaking, will be found to fall generally within one of the two following branches:—

First—where the courts of equity recognise some right wholly ignored by the common law, such as the rights of parties claiming under deeds or instruments of trust.

Secondly—(and I may observe that this division is far less extensive in its range than the former)—where a special *exclusive* and *quasi* paternal jurisdiction is exercised for the protection of persons under disability, such as infants and lunatics.

Under the *first* of these branches, we may range the following four subdivisions (a) :—

1. Trusts generally.
2. Administration of estates of testators and intestates.
3. The equitable jurisdiction in reference to the property of married women.
4. The equitable jurisdiction in reference to mortgages, penalties, and forfeitures.

To avoid misconception, let me say that I exclude purposely the jurisdiction of the Court of Chancery in reference to charities, for want of time at least, if not for other reasons.

The first of these four divisions, viz., “*Trusts*,” constitutes by itself by far the largest and most important head of equity jurisdiction. Indeed, either to this subdivision or to the second, viz., “*Administration of estates of testators and intestates*,” may be referred almost the entirety of the vast administrative business of the Court of Chancery, the distinction between which and the litigious business has been already pointed out or alluded to.

But besides being the most important head of equity, it is one of the most ancient; and, acting on the convictions expressed in my first lecture, respecting the

(a) Section 34 of the Judicature Act, 1873, assigns to the Chancery Division of the High Court (*inter alia*), “The execution of trusts, charitable or private” [*same* as sub-division 1].

“The administration of the estates of deceased persons” [*same* as sub-division 2].

“The redemption or foreclosure of mortgages” [nearly corresponding to sub-division 4].

importance of a historical treatment of equity jurisprudence, I propose giving a short account of the origin and rise of trusts.

Now, the notion of a use or trust is one with which you are probably so familiar that but little explanation is needed. It involves the supposition of land or other property being legally vested in a feoffee to uses, or trustee, upon confidence that he will deal with it according to the directions of some other person who is beneficially entitled, the *cestui que use* or *cestui que trust*.

In the period preceding the statute of uses, the *modus operandi*, in reference to land, was to execute a feoffment to some five or six persons, commonly called *feoffees to uses*. More frequently than not, so far as can be judged from the old cases, there was no written evidence of the uses upon which the feoffees were to hold the lands ; indeed, there can be no doubt whatever that, in the early origin of uses and trusts, the conveying party did not suppose he was imposing anything more than a merely honourable obligation upon those whom he *trusted* with his property. This honourable obligation our early ecclesiastical chancellors, blending doubtless to some extent their *functions* as spiritual guides and directors of the community with their *powers* as high State officials, converted, as has been explained, into what is now a recognised equitable liability.

At the present day, when the word "*trust*" has become a term of art, it is difficult to recognise in its now technical meaning the more popular sense

in which the word was originally used. We shall find, however, the clearest evidence that a mere confidence in the honour and good faith of the trustee was, *and still is*, sufficient to create a *trust*, if we turn to the class of authorities in which words amounting to no more have been held adequate for that purpose.

The cases on this point, which are *legion*, are well collected in Mr. Lewin's work on the Law of Trusts (*a*), but two instances will be sufficient for illustration. Thus, in *Parsons v. Baker* (*b*), a devise to a nephew in fee, "*not doubting*, in case he should have no child, but "*that he will dispose and give my said real estate, &c.*," was held to create a technical trust. And in *Macnab v. Whitbread* (*c*), where the gift was to a person, *in the full assurance and confident hope* that he would make a particular disposition, the present Master of the Rolls expressed his opinion that the words used would have been sufficient to constitute a trust, though for other reasons no trust was established. In fact, if the *subject-matter*, the property, be clearly defined, and the *objects* of bounty clearly pointed out, almost any words of intention are sufficient to create a trust. They may be words which, as in the cases just referred to, leave no doubt whatever on the reader's mind, that the matter was to be left to the honour of the persons to whom the property is given; and yet there will be a trust.

(*a*) Third edition, pages 167, 168. Fourth edition, pages 100, 101. Fifth edition, pages 104, 105. Sixth edition, pages 115, 116.

(*b*) 18 Vesey, 476.

(*c*) 17 Beav. 299.

In truth, to exclude the creation of a trust, where subject and objects are alike certain, it is almost necessary that the donor should say, in so many words, that he intends to leave the matter to the *honour* or *discretion* merely of the donee of the property, and *not* to impose any legal or equitable obligation (*d*).

In reference to the first causes of the introduction of uses and trusts, you are probably aware that the origin of uses is commonly ascribed to the endeavours of the ecclesiastics to evade the statutes of mortmain. It is said that the statutes of Edward I. having forbidden the grant of land to religious houses directly, it was conceived that the law could be evaded by grants to feoffees for the benefit of those houses; and probably the commonly received opinion is correct. The Statute Book, at all events, contains clear evidence that feoffments to uses were, in point of fact, adopted for the purpose of evading the law in this respect. Thus, by the 15th Ric. II. c. 5, all those who were possessed, by feoffment or by other manner, *to the use* of religious people, of lands, were directed to amortise the said lands (*i.e.* to convey them in mortmain), with the licence of the

(*d*) The case of *Huskinson v. Bridge*, 4 De Gex & Smale, 245 (in which a testator, after bequeathing his residuary estate to his wife, and expressing clearly and distinctly his wishes respecting the disposition thereof, concluded by saying that it was not his intention to deprive her of the exercise of the entire right over the property), will be found to afford an apt illustration of the exclusion of a trust, by words evincing an intention *not* to create one. And see *Fox v. Fox*, 27 Beavan, 301, *Eaton v. Watts*, L. R. 4 Eq. 151. The statement in the text may perhaps be considered too strong. It is sufficient if, upon a fair consideration of the words used, the intention appears to be to leave the matter to the discretion of the donee.

king, and of the lords of the fee, within a given time, or to convey them away to some other use ; and similar purchases to uses were made void for the future. But although the origin of uses may have been the desire to evade the statutes of mortmain, we must (since by the statute just cited the desire was so early frustrated) seek for other causes to account for the perpetuation of the system of uses. And these may be said to have been mainly four, viz. :—

First. By a feoffment to uses, the *cestui que use* acquired a power of devising his lands by will, and of dealing generally with the equitable ownership more easily and more arbitrarily than he could have done with the legal.

Secondly. In the event of his attainder the land was not forfeited, nor did it escheat.

Thirdly. The *cestui que use* escaped the oppressive incidents of feudal tenure.

Fourthly. The *use* was not liable to be extended on an execution.

As to the first cause, you must recollect that, previously to the time of Henry VIII. (a), the legal interest in land could not, except as regarded terms of years, be devised by will. There was in some boroughs a special power of devising by custom, as was also the case with the lands in Kent ; but the quantity of land so devisable was insignificant as compared with the total extent of the kingdom, and may be laid out of account. Hence a man might have large property, far more than enough

(a) See 32nd Henry VIII. cap. 1 ; and 34 Henry VIII. cap. 5.

to provide for two sons, or his eldest son might be a spendthrift, or worse ; still, so long as the *legal interest* remained in himself, he had no means of preventing his property from passing at his death to his natural heir. But the court of equity held that, where the legal estate had been conveyed to feoffees, the *use* was devisable ; and thus, by putting the land in use, an absolute power of testamentary disposition was acquired.

Again, at the period of which we are now speaking, the legal interest in the land could be conveyed only in a formal notorious manner by *livery of seisin* ; that is to say, in the ordinary case the conveying party executed a deed of feoffment, and then openly, on the land itself, delivered seisin to the feoffee, by handing to him a clod, a piece of turf, or a twig, with words showing that the delivery so made was symbolical of the delivery of the whole property. But where the land had been conveyed to uses, the *cestui que use* might deal with the beneficial interest by an entirely secret deed or instrument, without any livery.

Again, the nature of the interests which the common law allowed to be carved out of the legal estate was limited and restricted. Thus a fee could not be mounted upon a fee, nor could an estate of freehold be made to commence at a future time. The owner of the *use* was subject to no such restrictions in dealing with it.

The inducements, therefore, to put lands in "*use*," in order to obtain larger powers of disposition, were immense.

Secondly, the *use* was not, until the reign of

Henry VIII., forfeitable for the offence of a *cestui que use*, nor did it escheat in the event of the attainder, though the land itself was liable to be forfeited, or to escheat in the event of the attainder of the *feoffee to uses*. The natural result was, that in troublous times, like those of the last Edward and Henry VII., men who took an active part in political movements vested their lands in feoffees of their own selection, known from their character to be little likely to expose the property to forfeiture or escheat.

Thirdly, by putting the land in use, the burdens of the feudal law were evaded. You will find a most able exposition of the nature and character of these burdens in Sir W. Blackstone's Commentaries (a). It will be sufficient for my purpose if I remind you merely of *wardship* and *marriage*. The former feudal incident entitled the lord, where a tenant holding by knight's service died leaving an infant heir, to enter upon the possession of the heir's lands ; and, subject to his maintenance, to take the whole rents and profits during minority. The latter incident allowed the lord to sell the right of marrying his ward, subject to the only restriction that the marriage was not to be a disparaging one ; and if the ward refused to accept the marriage offered, he was heavily mulcted. Desire of escape from the hardships of feudal tenure would seem almost alone to have been a sufficient reason for resorting to the practices of uses.

Fourthly, where a debtor was legally entitled, the

(a) Book II., chapter v.

creditor was able to extend, under an *elegit*, a moiety of the land, and take the rents and profits in satisfaction of his debt. He had no such power in regard to the *use*. There was, therefore, the strongest temptation to every fraudulently disposed debtor—a class whom it is too much the fashion to consider as of purely recent origin—to put his land in use.

In the process of explaining to you the principal causes which led to the establishment of the system of uses, I have already pointed out most of the incidents and features of the *use*. Some few remarks may, however, be added.

It has already been mentioned that the use was transferable ; and you will have inferred, as of course, that in the absence of any disposition it descended as the legal interest would have done, though it was not held liable to curtesy or dower. Whether the rights of the *cestui que use* were enforceable against the original feoffee only, or also against those deriving legal title under him, was a point upon which different views were held at different periods of the history of uses, there being a gradual tendency in advancing ages towards more liberal doctrines on this head in favour of the *cestui que use*. In the reign of Edward IV., for instance, it was considered, that if the feoffee to uses died or aliened, the *cestui que use* had no remedy against the heir or the alienee. Thus, in a case reported in the Year Book, 8 Edward IV., folio 6, after a considerable discussion, whether a subpœna would lie against one only of several executors separately (the court held it would not), the case proceeds thus :—“ Et fuit move si

“ subpœna gist vers executor ou envers un heir. Et
 “ Choke dit que il sua anterfoits subpœna vers le heir
 “ de son feoffee et le mater fuit longmt debate. Et
 “ l’opinion de la Chancerie et les justices que il ne gist
 “ pas envs le heire, per que il sua un bill al Parlia-
 “ ment,” &c. And then Fairfax (one of the justices)
 says, with characteristic legal relish, “ *C’est matter*
 “ *est bon store pur disputer apres quant les auters*
 “ *veight*” (a).

It is stated in Bacon’s Abridgment (b), that the *subpœna* against the heir was first allowed in Henry VI.’s time; the law on this point being changed by Fortescue, C. J., but no reported case is referred to. We find, however, traces of more liberal doctrines in Keilway’s Reports, in the reign of Henry VII. (c), and in a great case in the Year Book, M. T. 14th Henry VIII. (d), although the judges differed in opinion upon other points, they seem to have agreed that, as a general rule, *subpœna* lay against both the heir and the alienee of the feoffee (e).

(a) See the same views treated still more clearly as sound law, in a case in the Year Book, 22 Edward IV. fol. 6.

(b) Vol. viii. p. 176; Uses and Trusts (B), 1.

(c) 42 pl. 6, 46 pl. 2.

(d) pl. 5.

(e) Part of the reasoning of Fitzherbert for holding the alienee of the feoffee to be bound is so well put and so quaintly illustrated, that I am induced to transcribe it. It is as follows :—“ Car si jeo infeffe B. a aver
 “ a lui et ses heirs et assigns; or mon *trust* et confidence est in lui in
 “ ses heirs et assigns; et ceo est prove bien, car les heirs seront liez de
 “ performer l’ volonte le feoffer si bien come son pere, et issint le second
 “ feffee si bien come le premicr, si ne soit consideration, et issint est si
 “ les feffees souffrent un recovere sans consideration : car sera entend par
 “ *Ley en tant or que sans consideration il departe ove l’terre in que il fuit*

The use being then such as it has been described to you, and the inducements to put land in use such as have been pointed out, the result was a large and gradually increasing quantity of land held in use : and the effects of the system have been thus graphically described in an oft-quoted passage of Lord Bacon : “ A
 “ man that had cause to sue for his land, knew not
 “ against whom to bring his action, nor who was the
 “ owner of it. The wife was defrauded of her thirds ;
 “ the husband of being tenant by courtesy, the lord of
 “ his wardship, relief, heriot, and escheat ; the cre-
 “ ditor of his extent for debt ; the poor tenant of his
 “ lease ” (a).

It was not to be expected that this state of things should be quietly submitted to. Accordingly, on reference to the Statute Book, we find a continual struggle going on against the system, or rather against its injurious results, which have just been mentioned. The efforts of the Crown and Legislature appear, in the first instance, to have been directed towards fixing the *cestui que use* with all the liabilities of the legal ownership. Thus, various statutes were passed in the reigns of Edw. III., Richard II., and Henry VII. (b),

“ *seisi al' use, qu'il departe ore ceo in le plus due forme il peut, s. come il*
 “ *ceo avoit adavant. Car ou un aet rest in entendment et indifferent la*
 “ *Ley adjugera le mieux : car si jeo voy un Prestre et une feme ensemble*
 “ *suspeceoneusement, uncore si longement que il est in doubt que il fait bien*
 “ *ou mal, covient entendre le melieur.*”

(a) The Use of the Law, Bacon's Works. Edition by B. Montagu, vol. xiii. p. 240.

(b) 50 Edward III. cap. 6 ; 2 Richard II. stat. 2. cap. 3 ; 19 Henry VII. cap. 15. (All repealed by the Statute Law Revision Act, 1863, as having become obsolete or unnecessary.)

rendering the use liable to be extended; and in the first year of the reign of Richard III. the *cestui que use* was empowered to alien the land as against his feoffee (a). In Henry VII.'s reign, the right of wardship was given to the lord over the heir of *cestui que use*, leaving, however, the right of testamentary disposition untouched (b); and by an act of the reign of Henry VIII. the *use* was made forfeitable for treason (c).

But these efforts, though, as the event proved, they were made in the right direction, were insufficient to satisfy the Crown; and towards the latter part of his reign, a new and great attempt was made by Henry VIII. to abolish uses altogether; and this, by proceeding upon an entirely different plan, viz. by turning the equitable uses into legal estates at law. This was the "modus operandi," or rather the *intended* "modus operandi," of the famous Statute of Uses (d). You know how it failed. The courts held, that if a man enfeoffed A and his heirs, *to the use of B and his heirs, in trust for C*

(a) 1 Richard III. cap. 1. (Repealed by the Statute Law Revision Act, 1863.)

(b) The epitome of this statute, 4 Henry VII. cap. 17, given in Ruffhead's edition, contains no allusion to this reservation of the testamentary right. In the Edition of Statutes published by the Record Commission, the Act is given at length, and the right of wardship is conferred only in the case of "*no will by him declared nor made in his lyfe touching the premisses or any of theym.*" (The statute was repealed by the Statute Law Revision Act, 1863.)

(c) 26 Henry VIII. cap. 13, s. 5. (Now repealed by the Statute Law Revision Act, 1863, leaving, however, the 33 Henry VIII. cap. 20, s. 3, in force.)

(d) 27 Henry VIII. cap. 10.

and his heirs; the statute turned the first use, viz. that in favour of B, into a legal estate, leaving B a trustee for C. Thus, two unexpected results flowed from the statute, viz. :—

1. Facilities were afforded for creating through the medium of it a variety of legal estates unknown to the common law.

2. The system of uses revived, with a new and more healthful vigour, under the name of trusts. I say revived with new and more healthful vigour, because, although it was held that the various statutes enacted respecting the use anterior to the Statute of Uses itself did not apply to the trust; yet, partly by judicial decision and partly by statutory enactment, the trust was gradually, though not without a struggle, by the end of the reign of Charles II. placed upon a similar, though more liberal and more satisfactory footing than the old use. Thus the trust descended like the legal interest, and was alienable, though, by a wise provision of the Statute of Frauds (a), not without writing. The heir or alienee might sue for its performance. It was subject to curtesy; and, by the Statute of Frauds, was made liable to execution (b). The trustee and his heir or alienee (except an alienee without notice of the trust) were alike subject to be sued in equity; and even the widow of the trustee, who became legally entitled to dower, and the husband of the female trustee, in respect of his legal estate by the curtesy, were held bound to perform the trust.

(a) 29 Car. II. cap. 3, s. 9.

(b) *Ibidem*, s. 10.

The only anomaly of importance was the exception lately removed (a), viz.:—that the equitable estate conferred no right of dower on the wife of the equitable owner.

I proceed now to the second subdivision under my first head, viz.:—"Administration of estates of "testators and intestates."

It is by no means clear that the jurisdiction of equity courts under this head might not properly be ranged under the general head of Trust, so far at least as it is really *exclusive*; but it is more convenient to treat it separately.

Administration suits may be said to be of three kinds :—

First. Creditors' suits.

Secondly. Legatees' suits.

Thirdly. Suits by parties interested in the residuary real and personal estate.

Now, the first class of suits cannot be said to be necessarily, and to all intents, suits for administration. The creditor has merely a right to be paid his debt. He may sue, according to the nature of his claim, the executor, heir or devisee, at law; and, upon his establishing his debt, recover against them to the extent of the assets with which they are chargeable. Except in reference to certain kinds of property, which courts of equity held to be assets, but courts of law did not; and except when the creditor comes to the court of equity on the footing of a *cestui que trust*, his rights in

(a) i.e. by the Dower Act of 1833, 3 & 4 Will. IV. cap. 105.

equity are no higher than at law. The frame of his bill is for payment of his debt, *if* the defendant, the executor or trustee, admits assets; *if not*, then for an account, and for payment of his debt in due course of administration. If the executor or trustee choose to admit assets, or to submit to a decree for immediate payment of the debt, the creditor gets what he is entitled to, and no administration takes place. Practically, however, this is a case of rare occurrence. The executor does not admit assets. The creditor establishes his debt at the hearing (a), the accounts are taken, and, if the assets be sufficient, the creditors are paid in full: if insufficient, they are paid rateably, having regard to their priorities (b). The surplus, if any, is administered according to the rights of the parties who come next after the creditors; and thus, *practically*, the creditor's suit is a suit for *administration*.

It is not easy to trace when the right of the creditor to file a bill in equity was first clearly established. The earliest cases were doubtless those, in which from the nature of the property to be administered, or from other circumstances, no relief could be had at law. One of the earliest reported cases is to be found in the Introduction to the "Proceedings in Chancery," already frequently referred to. The plaintiffs were

(a) The proof at the hearing does not conclusively establish the right of the plaintiff as creditor. A new case may be made in Chambers disputing the debt. See *Cardell v. Hawke*, L. R. 6 Eq. 464.

(b) By 32 & 33 Vict. cap. 46, specialty and simple contract debts of persons dying after January 1st, 1870, stand in equal degree.

the executors of one Vavasour; the defendants, the executors of the Bishop of Lincoln. The bill alleges that the testator, without any writing or speciality, of very trust, lent a thousand marks to the Bishop of Lincoln; and that the plaintiffs had no remedy by the common law (a).

Another early case, though of far more recent date, is to be found in Carey's reports (b). There the testator mortgaged his copyhold, and then devised the equity of redemption to be sold for payment of debts. The bill was, in substance, a suit by a creditor against the mortgagee and the heir for redemption and payment out of the proceeds of sale of the copyhold.

At a later time, though when it is difficult exactly to determine, the right of the creditor to file his bill in equity (even though the assets to be administered might be legal assets only, and the right to sue at law clear) became firmly established, and so remains at the present day.

We proceed to the second kind of administration suits, viz., Legatees' suits.

So late as the end of Queen Elizabeth's reign, it appears to have been at least doubtful, whether the only remedy of a legatee, seeking payment of his legacy from an executor, was not in the Ecclesiastical Court. Thus, in the little book by Tothill, called "Transactions of the High Court of Chancery," consisting, for the most part, of brief notes of decided cases, we find the following decision noted. "*Piggott contra*

(a) See Calendars of Proceedings in Chancery, vol. i. xciii.

(b) Page 9, edition 1820.

“ *Parson* : (44 Eliz.) Because the ground of the “ bill is for a legacy thought fit to be dismissed ” (a). On the other hand, in the same book, under the head “ Legacy,” various cases are referred to, in which the jurisdiction appears to have been exercised, and one of them (b) of eight years’ earlier date than the decision just cited.

The growth of the Chancery jurisdiction in respect of legacies is clearly traceable to the imperfections of the jurisdiction of the Ecclesiastical Courts. The latter, being a mere jurisdiction to decree payment of the legacy, was in a large number of cases unable to do justice. When the testator’s assets were clearly sufficient, no difficulty arose ; but when the debts were considerable, or there was reason to apprehend the existence of undiscovered liabilities, the arm of the Ecclesiastical Court was, for all useful purposes, paralysed. It had no power to make provision for the payment of debts : and if it decreed payment of the legacy simply, the executor might subsequently, upon the assets proving insufficient for payment of both debts and legacies, have to make good out of his own means that portion of the assets which he had, in obedience to the decree of the Ecclesiastical Court, applied in payment of the legacy.

Probably the earliest cases in which the legatee came to the Court of Chancery seeking payment of his legacy, were those in which he did so strictly in the character of *cestui que trust*, as where real

(a) *Tothill*, p. 19.

(b) *Yelverton contra Newport*, 36 Eliz.

estate had been devised for payment of debts and legacies.

Subsequently, we find cases in which the executor, being sued in the Ecclesiastical Court, filed his bill in the Court of Chancery, asking to be indemnified against payment. *Horrell v. Waldrup*, decided in 1681, was a case of this kind (a).

But the moment the Court of Chancery allowed the executor to insist upon the payment to the legatee being made under its own protection, it was matter of course that it should allow to the legatee the reciprocal benefit of suing the executor. Thus, suits by legatees became part of the established jurisdiction of the court, and so they remain at the present day.

The legatee, like the creditor, merely asks by his suit payment of what is due to him; and if the executor should choose to admit moneys in his hands applicable for payment, the suit may be at an end without more. But practically, a legatee's suit is, except in rare instances, a suit for administration. The executor is, from particular circumstances, unable

(a) The following is the material portion of the Report: "The plaintiff was sued in the Ecclesiastical Court for legacies, and preferred his bill here to be indemnified in the payment of them; and the defendant demurred, because the consance of legacies belongs to the Ecclesiastical Court, and they will take care to indemnify the party in payment of them.

"But the demurrer was overruled, because this court hath the proper consance of legacies, and in some cases, this court will take care for indemnifying the executor or administrator, where the Ecclesiastical Court cannot, and will make a legatee refund, if debts appear afterwards, if the legacy be decreed by this court; and this court will give interest for a legacy, which that court doth not, and the plaintiff hath an election to sue here or there." (See 2 Freeman, 83.)

or unwilling to admit assets. The legatee, of course, cannot be paid without prior payment of debts. Hence, the accounts have to be taken and the debts to be paid; and when the cause has reached that stage at which the pecuniary legatee is entitled to payment, the distribution, under the direction of the court, of the net residue amongst the persons entitled thereto, follows as of course. Thus, what is primarily a mere bill for a pecuniary demand, is in substance a bill drawing with it a general administration.

The third kind of administration suit, viz., that in which the plaintiff is a party interested in the residuary real or personal estate, demands but little explanation.

Here, the party seeking relief of the court comes really in the character of *cestui que trust*, asking to have the accounts taken, the estate cleared by payment of the testator's debts and legacies, the net residue ascertained, and the plaintiff's share paid to him, or if the plaintiff be under disability (say an infant), secured for his benefit.

Finally, I would observe, that in each of these three kinds of suits, the jurisdiction exercised, so far as it amounts to *administration*, is really *exclusive*. It is in a court of equity alone that the executor's accounts can be taken, the claims on the estate satisfied, and the net surplus ascertained and handed over to the proper parties; and, though the classification may not be in all points perfect, "*Administration of Estates of Testators and Intestates*" properly falls under the division of *exclusive jurisdiction*.

To proceed to my third subdivision, viz., “Equitable
“Doctrines in reference to the Property of Married
“Women.”

Upon the question whether the Court of Chancery can be said to exercise any protective jurisdiction over married women in the same way that it does over *infants*, I shall say a few words presently, when I reach my second main branch of exclusive jurisdiction. For the present, I limit myself exclusively to the question of *property*.

Consider first the position of a married woman *at law* in reference to property. The husband upon marriage becomes absolutely entitled to all his wife's personal estate, and to an estate during the joint lives of himself and his wife in her freehold property. This last estate becomes enlarged into an estate for his own life (the estate by the curtesy) immediately upon the birth of issue of the marriage. The *law* (a) annexes, in reference to the husband's title to the wife's personal estate, one qualification for the benefit of the latter, viz., that if the husband does not reduce the personalty into possession during the coverture, and the wife survives, the wife retains, by right of survivorship, so much of her personal estate as has not been so reduced into possession. The *law* also, in its result, enforces one disability for the benefit of the wife, viz., that she shall not alien her real estate except upon the terms of her being separately examined, and (after the effect of the intended alienation has been explained to

(a) *i.e.* law as distinguished from equity.

her) giving her personal assurance that the alienation is of her own free will. Thus stands the matter at law (a). In equity the privilege and protective disabilities of the wife are more extended.

They are mainly three :—

(a) The legal position of married women has been materially modified by the “Married Women’s Property Act, 1870,” 33 & 34 Vict. cap. 93, of which the following is an abstract :—

- § 1. The earnings of married women are to be deemed property held to their separate use. See *Ashworth v. Outram*, 5 Ch. D. 923.
- § 2. The same as respects deposits in savings banks.
- § 3. Married women may hold public stock in their own names as if settled to their separate use, and deal with the same as if they were unmarried. See *Howard v. Bank of England*, L. R. 19 Eq. 295.
- § 4. The same as to shares, debentures, or stock in joint stock companies, to the holding of which no liability attaches. See *Queen v. Carnatic Railway Company*, L. R. 8 Q. B. D. 299.
- § 5. The same as to interests in friendly, benefit, and other similar societies.
- § 7. Personal property coming to a woman *married after the passing of this Act*, during her marriage, as next of kin, and any sum not exceeding 200*l.* coming to any such woman during marriage under a deed or will, to belong to her for her separate use, and her receipts alone to be good discharges.
- § 8. The same as to rents and profits of freehold, copyhold, or customary hold property, which shall descend upon a woman so married.
- § 9. Contains special provisions for the decision of questions of ownership as between husband and wife.
- § 10. Enables a married woman to effect policies of assurance on her own or her husband’s life for her separate use, and contains other provisions as to policies. See *Mellor’s Policy Trusts*, 6 Ch. D. 127 ; 7 Ch. D. 200.

1. The capacity of the wife to hold property as a *feme sole* ; to have a separate estate, in fact.

2. The wife's equity to a settlement out of equitable interests.

3. The wife's disability in reference to her right of survivorship in equitable interests.

§ 11, is as follows : “ A married woman may maintain an action
“ in her own name for the recovery of any wages,
“ earnings, money, and property by this Act declared
“ to be her separate property, or of any property
“ belonging to her before marriage, and which her husband shall by writing under his hand have agreed
“ with her shall belong to her after marriage as her
“ separate property, and she shall have in her own
“ name the same remedies, both civil and criminal,
“ against all persons whomsoever for the protection and
“ security of such wages, earnings, money, and property,
“ and of any chattels or other property purchased or
“ obtained by means thereof for her own use, as if
“ such wages, earnings, money, chattels, and property
“ belonged to her as an unmarried woman, and in any
“ indictment or other proceeding it shall be sufficient
“ to allege such wages, earnings, money, chattels, and
“ property to be her property.”

§ 12, is as follows : “ A husband shall not by reason of any
“ marriage which shall take place after this Act has
“ come into operation be liable for the debts of his wife
“ contracted before marriage, but the wife shall be liable
“ to be sued for, and any property belonging to her
“ for her separate use shall be liable to satisfy, such
“ debts as if she had continued unmarried.”

§ 13. A married woman having separate property is made liable to the parish for the maintenance of her husband.

§ 14. The same as respects her children.

Of the foregoing provisions, the 7th, 8th, and 12th sections apply only to women married after the 9th August, 1870; the rest are general. The

The first of these three heads, viz., the wife's separate estate, has been selected for particular consideration in my seventh lecture. For the present, therefore, I shall only say that in a court of equity a married woman may, in reference to property, be placed in the position of a *feme sole*.

I pass, then, to the wife's *equity to a settlement*.

Where a husband becomes entitled, in right of his wife, in possession, to property which he is unable to recover at law (say a legacy left to his wife by the will of a testator, or a share of personalty to which his wife has become entitled under a settlement), although *prima facie* the husband is entitled to receive the property, so that, upon the executor or trustee paying him the wife's legacy or share of personalty, the husband's receipt would be a good discharge (a); yet, if the intervention of a court of equity be in any way called into action, the court allows the husband to receive the property, subject only to what is called the wife's right or equity to a settlement; that is to say, unless the wife expressly waives this right or equity, the court will inquire into all the circumstances con-

12th section has, as explained at page 27 *supra*, been repealed as to husbands and wives married after the 30th July, 1874.

The chief novelty is to be found in the 11th section, which gives the wife, so far as respects her statutory separate estate, a right of action at law in her own name, and of suit in equity without a next friend. But where a married woman is sued, her husband must still be joined as defendant; *Hancocks v. Lablache*, 3 C. P. D. 197.

(a) The law is now (by section 7 of the Act of 1870) altered as to women married after August 9, 1870, except where property exceeding 200*l.* is acquired under a deed or will. Where the property so acquired exceeds 200*l.*, or the marriage is of earlier date, the law remains unchanged.

nected with the marriage (*e.g.*, whether the husband has made a settlement on his wife; how much of her property he has already received: what is his pecuniary position; whether the husband and wife are living together or apart), and will, upon a consideration of all the material facts, decide how much of the property (if any) shall be paid to the husband, or those claiming under him, and how much (if any) shall be settled on the wife (*a*).

There can be little doubt, I think, from the name given to this privilege, and from the earliest notices of it which occur, that it originated in those cases where the executor or trustee, declining to pay to the husband, the latter filed his bill in Chancery. Thereupon the court said, "You, the husband, who seek equity, must do equity; and we will not decree payment of any part to you except upon the terms of your settling upon your wife and her children (*b*), if she so desire, a fair share of the property acquired by you through her" (*c*).

(*a*) The cases are too numerous for detailed reference. Amongst the more instructive are *Gardner v. Marshall*, 14 Simons, 575; *Vaughan v. Buck*, 1 Simons, N.S. 284; *Bagshaw v. Winter*, 5 De Gex & Smale, 466; *Dunkley v. Dunkley*, 2 De Gex, Macn. & Gor. 390.

(*b*) The common form of settlement, in the absence of special cases, is upon trust, to pay the income to the wife during her life for her separate use, with restraint on anticipation; and after her death upon trusts for her children, and in default of children for the husband absolutely. The principle upon which the settlement is so framed is that the husband and those claiming under him are entitled to the fund, except so far as it may be necessary to make a provision for the wife and children. See *Walsh v. Wason*, L. R. 8 Ch. 482, and cases there cited.

(*c*) The rights of the wife are in general the same, whether the Equity is sought to be enforced against the husband himself, or against his

It is, however, certain that the wife's right is, at the present day, far more extensive than the suggested historical origin would logically warrant. Thus, it may extend to the whole fund (a), and therefore could not now be regarded as the price paid by the husband for the court's interference in his favour; not to mention that it is now clearly settled that the equity is one which the wife may herself assert actively either by bill (b), or by petition (c).

Next, as regards the wife's right of survivorship in equitable interests. Here, in the main, equity follows the law. If the husband can contrive to reduce the

assignee in insolvency, or trustee in bankruptcy, or his particular assignee for value, subject, of course, to a due consideration of the special circumstances arising from the fact of insolvency, bankruptcy, or assignment. There is, however, an exception as to life interests of the wife. As to these, so long as the husband lives with the wife, and maintains her properly, or offers so to do (*Bullock v. Menzies*, 4 Vesey, 798), no Equity exists, as against him. Upon his failing to maintain his wife properly, or, which in effect is the same thing, upon his being separated from her by his own fault (*Barrow v. Barrow*, 5 De Gex, Macn. & Gor. 782), or becoming by insolvency or bankruptcy (*Tauuton v. Morris*, 8 Ch. D. 453), unable to maintain her, the Equity is enforceable against the life interest. By a process of reasoning, more subtle than satisfactory, it has been held, that if the husband, while duly maintaining the wife, assigns for value her life interest, and then deserts her, she has no Equity to a settlement (*Tidd v. Lister*, 10 Hare, 140, 3 De Gex, Macn. & Gor. 857, and cases there cited). But, of course, in such a case, the assignment of the husband does not affect the wife's right by survivorship.

(a) *Dunkley v. Dunkley*, 2 De Gex, Macn. & Gor. 390; and numerous other cases collected in *Lewin on Trusts*, 4th edition, p. 482, note (c), 5th edition, p. 530, note (h), 6th edition, p. 614, note (b).

(b) See *Lady Elibank v. Montolien*, 5 Vesey, 737; *Duncombe v. Greenacre*, 28 Beavan, 472; 2 De Gex, Fisher, & Jones, 509.

(c) See *Greedy v. Lavender*, 13 Beavan, 62; also *Scott v. Spashett*, 3 Macn. & Gor. 599.

equitable interest into possession, the wife's right by survivorship is gone : if otherwise, it remains. The result, subject to the enactments of the Act of last session (a), to which I will presently allude, is, that when the wife becomes entitled to an equitable reversionary interest in personalty, her right by survivorship cannot, so long as the interest remains reversionary, be barred. In other words, the wife's reversionary equitable interest is, save where the statute applies, inalienable as against her right by survivorship. The husband can confer a title only as against himself in the event of his surviving.

So soon as the doctrines of equity on this point were settled, which it may be said they were finally by the great case of *Purdew v. Jackson* (b), a period of continued attempts to evade the effects of the doctrine followed. Thus, where the wife's interest was reversionary, the husband bought the life estate, procured an assignment of it to the wife, and then sought to treat the wife's interest as immediate, and capable, therefore, of being reduced into possession. It may be said, briefly, that all devices of this description received their deathblow by the decision in *Whittle v. Henning* (c).

Whether the inconvenience created by the joint operation of *Purdew v. Jackson*, and of this decision, in rendering certain descriptions of property practically inalienable, did or did not outweigh the advantage of securing to the wife one species, at least, of possession

(a) The Session of 1857.

(b) 1 Russell, 1.

(c) 2 Phillips, 731.

which the husband, to adopt an expressive phrase, could not even beat out of her, has been much debated. The Legislature has, however, lately decided in favour of freeing this description of property from the fetters thus imposed upon its alienation. In the last session of Parliament an Act (*a*) was passed enabling married women to dispose of their reversionary interests in personal estate.

The provisions of this Act are shortly as follows:—

By section 1, married women may by deed dispose of reversionary interests in personal estate acquired under any instrument made after the 31st day of December, 1857 (*b*).

By section 2, it is provided that the deed to be executed by the married woman shall be acknowledged by her in the mode prescribed by the Act for the Abolition of Fines and Recoveries, thus securing to her the benefit of a separate examination.

By section 3, the powers of disposition given by the Act are not to interfere with any other powers.

By section 4, interests acquired by married women, under their marriage settlements, are excepted from the operation of the Act.

It is obvious, that as the Act extends only to interests acquired by married women under instruments made subsequently to December 31, 1857, its operation must, for some time at least, be very limited.

Before parting with this subdivision of my subject, let me warn you against confounding the two questions,

(*a*) 20 & 21 Vict. cap. 57; known as Malins' Act.

(*b*) See Butler's Trust, Irish Rep. 3 Eq. 138.

of the wife's right by survivorship, and the wife's equity to a settlement. It is by no means uncommon to find considerable confusion of ideas in this respect.

The wife's *equity to a settlement* arises only when the fund is ready to be reduced into possession (a). It may be waived by the wife. This, where the fund is within the control of the court, is commonly done by the wife attending before the judge in open court, when she steps up to the bench, the judge satisfies himself, by a few words of conversation, that the wife understands what is about to be done, and is willing that her husband should have the fund, and thereupon, as the phrase is, "takes her consent" (b). If the wife cannot attend in court, her consent may be taken by commission; and I may observe, that in reference to interests acquired

(a) This statement needs qualification. Recently, in an administration action, a married woman, who was absolutely entitled to a share of a fund in court representing the residuary estate of the testator, after judgment but before further consideration, presented a petition to enforce her equity to a settlement, and it was held that she was entitled to an immediate order for a settlement, although the fund would not be distributable until after further consideration, and the amount of her share had not yet been ascertained (*In re Robinson's Estate*, 12 Ch. D. 188).

(b) When the fund to be dealt with is under 200*l.*, the court was in the habit of paying the fund to the husband, without requiring the consent of the wife to be evidenced in this formal manner. The selection of 200*l.* as the limit within which the operation of Section 7 of the Act of 1870 is (as to money coming under a deed or will) confined, was doubtless determined by this circumstance. Where Section 7 of the Act applies, the payment must now be to her on her separate receipt. Where the marriage is prior to the Act, the old practice must prevail, but the wife will still have, as she always had, an equity to a settlement, however small the sum may be, which if she assert, instead of remaining merely passive, the court will give effect to.—*Re Cutler*, 14 Beavan, 220; *Re Kincaid*, 1 Drewry, 326.

under instruments made after the 31st of December, 1857, the wife may, by deed acknowledged, release her equity to a settlement.

On the other hand, the *right by survivorship* is one of which, except so far as the Act of 1857 applies, the wife cannot deprive herself by any act during the coverture; and any device by the husband for the purpose of accelerating the period of possession is, as we have seen, treated by the court as a fraud on the wife's rights, and wholly ineffectual.

In concluding this my third subdivision, it will be well to notice, that both the capacity to have a separate estate, which I have not touched upon, and the peculiar rights of married women embodied in the special equitable doctrines, which I have attempted to explain, are equally ignored by courts of law (*a*), and that the jurisdiction of equity in this respect is strictly a head of *exclusive jurisdiction*.

My fourth subdivision, that of "Mortgages, Penalties, and Forfeitures," alone remains. Time forbids anything beyond mere general observations on this head of equity: and as respects general observations, I can add but little to what I said on this head in my first lecture (*b*).

In a mortgage, the estate is conveyed to the mortgagee, subject to a proviso for reconveyance upon payment of a sum of money on a day named. The money is not paid. At law the mortgagor has then no longer

(*a*) See now the Married Women's Property Act, 1870, of which a summary is given at pages 57, 58, *ante*.

(*b*) Pp. 23, 24, *supra*.

any right. In equity, however, it is held he has still a right to redeem. Again, where a bond was given, in a certain *penalty*, to secure the payment of a smaller sum on a day fixed, and the sum was not paid, at common law the obligee was entitled to the whole amount of the penalty; though, as you know, not in equity. Again, a lease is made, reserving a certain rent, and a right of re-entry is given to the lessor if the rent be not paid punctually within a certain time after the day stipulated. It is not paid. The lessor proceeds to eject the lessee. The latter files his bill, tendering the rent, interest, and costs, and the court relieves the lessee on those terms.

In my first lecture I pointed out to you the great difficulty of justifying logically the exercise of this head of jurisdiction, in *its origin* (a). The tendency of later times, however, has been to incorporate into the *common law*, either by statute or decision, the equitable doctrines on these subjects.

Thus, as respects mortgages. No one thing can be more purely the creature of the courts of equity than the equity of redemption, or right to redeem. Yet we find it, by a statutory enactment of the reign of George II. (b), made a subject of common law jurisdiction. By this Act, when an action by mortgagee against mortgagor is pending at common law, either for recovery of the mortgage-money or for ejectment, the mortgagor may bring his principal and interest into court, and the common law court has power to compel

(a) Page 23, *supra*.

(b) 7 Geo. II. cap. 20.

a re-conveyance ; and thus, under this Act, the common law courts may, and occasionally do, in substance decree a redemption. I cannot say that the statute is often called into operation. It only applies, in truth, where nothing is to be done but to compute the principal and interest due. I have, however, in practice known one instance of its being resorted to (a).

Again, as respects penalties, the statute 8 & 9 William III. c. 11, providing, in the case of bonds given for securing the due performance of covenants, a special machinery for ascertaining the damage actually sustained by reason of any breach or breaches, and for allowing the judgment for the amount of the penalty of the bond to remain as security against any future breach, is well known. So is the provision in the 4th & 5th Anne, c. 16 (b), which allowed the obligor in a simple money bond to pay into court, after breach, the principal and interest due, and all costs, in full satisfaction of the penalty of the bond, which at common law was absolutely due.

But, further, the mode in which the common law courts have, in recent times, embodied in their own decisions the equitable doctrines on this head, is extremely remarkable.

I refer to the class of decisions establishing the distinction between penalty and liquidated damages,

(a) See, as to the kind of notice requisite to oust the statutory jurisdiction, *Doe v. Louch*, 14 Jurist, 853 ; and see, too, ss. 219, 220, of the Common Law Procedure Act, 1852 ; the object of which enactments probably was to obviate any questions respecting the applicability of the 7th Geo. II to the new action of ejectment.

(b) Sect. 13.

of which *Kemble v. Farren* (a), may be regarded as the leading case. Thus, where the parties to a contract agree, that in the event of a breach of some or one of its stipulations, the party guilty of such breach shall pay to the other a given sum, the court looks at the whole agreement for the purpose of ascertaining whether the fixed sum appears to be intended as a penalty, or as fixed or liquidated damages. If the former, then the plaintiff may, in respect of the breach, recover only the damages actually sustained by him, as assessed by the jury. If the latter, the liquidated sum itself is recoverable. In the leading case just mentioned, there was a distinct stipulation that the sum named, 1,000*l.*, should be *liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof*; and yet the court, looking at all the circumstances of the agreement, held the sum named to be a penalty (b).

It only remains that I should observe, that the modifications introduced into the common law, both by statute and decision, though practically giving to the common law a qualified jurisdiction in reference to this last subdivision of our subject, have appeared to me too limited in extent to form any substantial objection to including "mortgages, penalties, and forfeitures" amongst the heads of "*exclusive jurisdiction*."

My first main branch of exclusive jurisdiction is now ended; and I proceed to the second, which embraces

(a) 6 Bingham, 141.

(b) The whole law on the point will be found well collected in Chitty on Contracts not under Seal, chapter vi.; and see *Re Newman*, 4 Ch. D. 724.

those cases in which a *quasi*-paternal jurisdiction is exercised by the Court of Chancery for the protection of persons under disability.

Persons not "*sui juris*" may be ranged under one of the three classes of *married women*, *lunatics*, and *infants*.

As respects *married women*, it is difficult to say that courts of equity exercise any jurisdiction of a strictly protective character over them. There exists, no doubt, a jurisdiction under which, upon the wife suing out what is called a *writ of supplicavit*, the Court of Chancery may afford her the same kind of relief as would be afforded in a common law court, upon her exhibiting "Articles of the Peace" against her husband. But this jurisdiction, now practically obsolete, is not confined to married women, but may be exercised in favour of any person, "*sui juris*" or not. Again, in reference to those personal rights of the married woman against her husband, which flow more particularly from the marriage contract; the remedy of the wife has hitherto always lain in the Ecclesiastical Court, and will, upon the Divorce and Marriage Act of last session (*a*) coming into operation, lie in the "Court for Divorce and Matrimonial Causes."

Respecting *lunatics*, I abstain from saying anything now, as the jurisdiction in lunacy is of a special nature, and will receive a separate consideration (*b*).

(*a*) 20 & 21 Vict. cap. 85.

(*b*) The course embraced one lecture on lunacy, which is excluded from this series, for reasons of little interest to the reader.—The Judicature

The protective jurisdiction of the court over *infants* alone remains.

How far this jurisdiction was or was not legitimately assumed by the chancellor, has been hotly debated. Mr. Hargrave, in his well-known note to Coke Littleton (*a*), under the head "guardian by the appointment of the chancellor," maintained strenuously that the jurisdiction was simply usurped. Mr. Fonblanque, on the other hand, in a note of almost equal celebrity appended to the "Treatise on Equity (*b*)," refers the general superintendence and protective jurisdiction of the court in the case of infants, to a delegation of the duty of the Crown as "*parens patriæ*." The controversy (*c*) is, however, Act, 1873, section 17, amongst excepted jurisdictions not transferred to the High Court, mentions the following :—

"Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind."

And by the 7th section of the Judicature Act, 1875, this excepted jurisdiction is to be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be entrusted by the sign manual of Her Majesty with the care and commitment of the custody of such persons and estates.

(*a*) 88 b. note 70.

(*b*) Book II. part ii. ch. ii. s. 1, note (*a*).

(*c*) The fusion of jurisdictions effected by the Judicature Act, 1873, has rendered this controversy more than ever unimportant; and the Act, by section 34, assigns to the Chancery Division all causes and matters for "The wardship of infants and the care of infants' estates."

It must be borne in mind, however, that a special statutory jurisdiction was by 20 & 21 Vict. cap. 85, sect. 35, and 22 & 23 Vict. cap. 61, sect. 4, conferred on the Divorce Court in respect to the custody, maintenance, and education of the children of those whose marriage is the subject of proceedings in that Court, and that this jurisdiction is now assigned to the Probate, Divorce, and Admiralty Division of the High Court. And the old jurisdiction by Habeas Corpus is still exercisable by the Queen's

ever, not as to the existence or limits of the jurisdiction, but merely as to its origin.

I am compelled to condense into few words the practical results in reference to the protective jurisdiction of the court over infants.

The first observation is, that the possession of property by the infant is not actually necessary to sustain the jurisdiction, though, without property, it cannot usefully be called into exercise. The remarks of Lord Eldon on this point, in the great case relating to the custody of Mr. Long Wellesley's children (*a*), reported at the original hearing before him, should be read with the greatest care.

Secondly, where the property was small, the court was in the habit of exercising its jurisdiction to appoint a guardian, and direct maintenance upon *petition*, without bill filed; and this jurisdiction it now, under the new practice, exercises at chambers, upon summons.

Thirdly, the power of the court was paramount even to that of the father; the court taking upon itself to deprive even the father of the custody of his child, whenever the father's conduct rendered it desirable for the best interests of the infant that that step should

Bench Division as respects infants. But in its exercise the rules of Equity must be followed, *In re Goldsworthy*, 2 Q. B. D. 75.

(*a*) *Wellesley v. Duke of Beaufort*, 2 Russell, 1; see pp. 20, 21. It is a common practice, when it is desired to make an infant a ward of court, to vest some small sum, say 100*l.*, in a trustee for the benefit of the infant, and then to file a bill in the name of the infant against the trustee. See the practice noticed in *Gurney v. Gurney*, 1 Hemming & Miller, 419, 420.

be taken. This was the great point decided in the case of Mr. Long Wellesley's children. The observations of Lord Redesdale in this case, when on appeal before the House of Lords, cannot be too carefully studied (a).

Fourthly, the power of the court being paramount to even that of the father, *à fortiori* it is so to that of all guardians, including testamentary guardians, appointed by the father's will under the statute of Charles II. (b).

With these extremely meagre observations on a subject which, by itself, would afford matter for an extensive treatise, I must conclude my notice of the exclusive jurisdiction of the court.

(a) Reported on appeal, *Wellesley v. Wellesley*, 2 Bligh, N.S. Subject only to the power of the court, that of the father was at the time of this decision absolute even as against the mother, and however young the child.

Subsequently, by 2 & 3 Vict. cap. 54, commonly referred to as Talfourd's Act, the Court of Chancery was authorised, upon the petition of the mother, to make in her favour an order for access to her infant child, and if the child were under seven years old, to commit the custody to her until that age. This Act was repealed by the 36 & 37 Vict. cap. 12, which authorises the Court to commit the custody of any infant to its mother up to the age of 16, after which period the infant would (subject to the paramount authority exercised by the Court of Chancery over its own wards) have a right of choice; see *re Andrews*, L. R. 8 Q. B. 153, p. 159. For an exposition of the principles which guide the Court in cases arising under the Act, see *In re Taylor*, 4 Ch. D. 157.

(b) *i.e.*, 12 Car. II. cap. 24, s. 8.

LECTURE V.



IN reviewing the concurrent jurisdiction of the Court of Chancery, I propose adopting the following arrangement :—

First, I shall submit some general observations in reference to the sources of equity jurisdiction, known as *Fraud*, *Accident*, and *Mistake*, pointing out how far they contribute to the concurrent jurisdiction of the court; and—

Secondly, I shall touch, *seriatim*, upon the more important heads of concurrent equity jurisdiction, which, while subsisting independently altogether of the general sources just referred to, will be found, in most cases, to owe their origin and vitality to the superior efficacy of the remedy administered by the Court of Chancery.

Now, as respects the first part of my task, I would observe, that any one of the three ingredients, *fraud*, *accident*, or *mistake*, may occur in any kind of suit; in a suit relating to equitable interests or estates, over which the Court of Equity has *exclusive* jurisdiction, just as in a suit in which the interests involved are purely legal, and the jurisdiction *concurrent* only. In

the former case, however, the jurisdiction in equity being already established on distinct grounds, the precise influence of the particular ingredient of "*fraud*," "*accident*," or "*mistake*," in attracting the interposition of equity, is comparatively little noticeable. In the latter, where it is the very foundation of the jurisdiction, its exact effect and weight can be traced and estimated.

This, I conceive, is the reason why we find *fraud*, *accident*, and *mistake* commonly discussed under the head of *concurrent* jurisdiction.

Now, going back to the earliest discussions respecting the interposition of equity, we find it repeatedly stated, that "covin, accident, and breach of confidence," are the proper subjects of equity jurisdiction (a). There was a doggerel rhyme in vogue expressing the legal views on the subject:—

“ Three things are judged in court of conscience :
Covin, accident, and breach of confidence.”

The last of these three, breach of confidence, we have already, as you know, considered under the head of “ trusts,” the modern equivalent for the word “ *covin* ” is “ *fraud*.” And *fraud* we now proceed to consider, together with *accident* (also referred to by Lord Coke) and *mistake*, which, to the best of my belief, is not mentioned as a head of equity, either by him or by any other text writer of ancient date.

Taking, then, *fraud*, *accident*, and *mistake* in the order mentioned, it is first to be observed that, when

(a) See 4 Inst. p. 34.

discussing "*fraud*" under the head of *concurrent* equity jurisdiction, we have, in strictness, no concern with those cases of constructive fraud, which rest upon doctrines forming part of almost every system of civilised jurisprudence, but yet ignored by the common law of England: I mean the doctrines, according to which a special disability is imposed, in reference to the dealings, whether in the nature of contract or of gift, of persons standing towards one another in certain confidential relations; such as *solicitor* and *client*, *guardian* and *ward*, *trustee* and *cestui que trust*.

Thus, by the Roman law, the tutor (or guardian) was prohibited from purchasing the property of his pupil (or ward), and a similar rule was applied to those standing in a similar fiduciary position (*a*).

So by the Code Napoleon the tutor (or guardian) is prohibited from either buying or taking a lease of his ward's property, without special authorization given by what is called the "*conseil de famille*," the family council, composed of the near relatives of the ward (*b*).

Our own equitable rule on the subject, in reference to gifts, was, in a case frequently quoted, thus referred to by Lord Eldon: "This case proves the wisdom of the court, in saying that it is almost impossible, in the course of the connection of guardian and ward,

(a) Tutor rem pupilli emere non potest, idemque porrigendum est ad similia: id est, ad curatores, procuratores, et qui aliena negotia gerunt. — Digest xviii. tit. 1, l. 34, s. 7.

(b) Code Civil, § 450. See also § 907, incapacitating the tutor from taking by will or gift *inter vivos* until after his accounts have been rendered and passed, and, § 909, invalidating dispositions by will or gift *inter vivos* made during a last illness in favour of medical attendants.

“attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty” (a).

Laying out of account, then, these cases of “constructive fraud,” or “fraud in equity,” we proceed to consider the equity jurisdiction in cases of fraud, in its popular or ordinary sense of imposition or circumvention; cases, in fact, falling within the old legal term “covin,” and which, in the modern text-books, such as “Story’s Equity Jurisprudence,” you will find ranged under the head of *actual fraud* (b).

Now, in these cases of actual fraud, the jurisdiction of equity was, in the main, strictly *concurrent*. The court of law took cognisance of the fraud, both as ground for a right of action and as a ground of defence. Thus, where money had been obtained through fraud, an action on the case lay for its recovery back; and to any action brought upon an instrument obtained by fraud, a plea of fraud in obtaining it was a good defence.

The equity jurisdiction, however, possessed many advantages over the legal. Thus, in most instances of actual fraud, equity possessed the means of com-

(a) *Hatch v. Hatch*, 9 Vesey, 292. As respects the equitable rule in reference to “purchases,” in cases where the relation is that of “solicitor and client,” one of the most valuable judgments is that of Vice-Chancellor Wigram, in *Edwards v. Meyrick*, 2 Hare, 60. As to the distinction between a gift *inter vivos* from a client to his solicitor and a testamentary disposition by the former in favour of the latter, see *Hindson v. Weatherill*, 5 De Gex. Macn. & Gor. 301; *Walker v. Smith*, 29 Beavan, 394. The distinction applies *à fortiori* to the relations of guardian and ward, and trustee and *cestui que trust*.

(b) Story, Eq. Jur. vol. i. chapter vi.

elling the defendant to answer, upon oath, detailed interrogatories respecting all the alleged facts and circumstances of the fraud, many of which facts and circumstances might be known only to the plaintiff and defendant; and this advantage alone would almost seem sufficient to have attracted into equity almost the entire jurisdiction in reference to fraud, when it is considered that, until within the last few years, neither could the plaintiff be heard as a witness to prove his own case, nor could he compel the defendant to attend and give evidence (a).

Again, where the fraud had resulted in a deed actually executed, conferring some estate or right which might be asserted *in futuro*, what was really wanted was a judgment, directing the deed to be given up to the person defrauded, or ordering it to be cancelled; and this was a species of remedy which the law courts never took upon themselves to administer. You may recollect, perhaps, my pointing out in my first lecture, that the maxim that equity acts "*in personam*" forms one of the distinguishing features of the equitable jurisdiction (b). As an offshoot of this maxim, we find the equity courts, in the early times of Henry VI. and Edward IV., compelling the actor in the fraud to restore the fruits of his fraudulent conduct.

If anything further were needed to establish the superior appropriateness of the equitable jurisdiction over the legal, it will be found in the circumstance, that the Equity Court is able in conformity with its

(a) See this more fully treated in the next lecture, under *Discovery*.

(b) Pp. 24, 25, *supra*.

habitual mode of action, while setting aside and undoing the fraudulent transaction, to qualify the annulling operation of its own decree in such a manner as may seem just. Thus, in the case of a bill to set aside a conveyance of real estate, as having been obtained by fraudulent representations at a grossly inadequate value—if the court sets aside the deed, it will do so only on the terms of repayment of the purchase money and interest.

When we consider, then, the advantages of the Equity Court, in respect—first, of compelling discovery; secondly, of interfering actively to annul instruments fraudulently obtained; and thirdly, of properly modifying its decrees and adjusting them to the rights of all parties; it can hardly be wondered at that its jurisdiction, though technically *concurrent*, should have become almost *exclusive* in practice.

We pass to the consideration of *Accident*.

There is hardly any head of equity which more completely eludes definition. General principles may, however, be laid down.

And first, it is clear that, in reference to obligations flowing out of contract, *Accident*, using the word in its ordinary sense, constitutes no more in equity than at law any valid excuse for the non-performance of those obligations.

Thus, if I contract to build a house by a given day, and if, after I have proceeded for some time regularly in the performance of my contract, a considerable portion of the materials which have been prepared for enabling me to complete the house is, *by pure accident*,

without any default of mine (say, by a fire originating by lightning), destroyed, and that, so shortly before the time fixed for completion that it is impossible to replace the materials, yet this constitutes no case of *accident* relievable in equity.—I contracted simply to build by the time, and must abide by my contract.

In the early history of our equity jurisprudence, a different view, doubtless, prevailed. Lord Coke illustrates “accident” thus: “Accident, as when a servant “ of an obligor, mortgagor, &c., is sent to pay the “ money *on the day*, and he is robbed, remedy is to be “ had in this court against the forfeiture” (a).

We find, in the Introduction to the Calendars of Proceedings in Chancery (b), an instance in which the jurisdiction of the court appears to have been invoked on grounds of this kind. The plaintiff having entered into a bond, under a heavy penalty, to repair certain river banks near Stratford-at-Bow within a given time, had been prevented (as he alleged) from completing his contract by sudden and unexpected floods; and the obligee in the bond having thereupon sued him at law for the penalty, the plaintiff brought his bill for relief. The answer of the defendant in equity in substance asserts that the plaintiff might, with due diligence, have completed his contract.

(a) 4 Inst. p. 84. This passage confirms the view put forward in the first lecture, p. 24, *supra*, that in the earliest instances of relief against penalties and forfeitures, the existence of some circumstance of accidental hardship formed a material inducement to the interference of the Court.

(b) Vol. i. p. cxlii.

The final result of the suit does not appear; but the bill probably reflects accurately the views of the day respecting equity. However, as we stated above, no accident of a similar description would, at the present day, afford ground for relief; and if we lay out of consideration the original influence of the ingredient *accident*, in cases of penalties and forfeitures, the only two classes of cases in the equity jurisprudence of the present day which seem to me to be properly referable to the head *Accident*, are :—

First.—The cases in which the equity jurisdiction is exercised in reference to lost instruments; as where, upon a bond or negotiable instrument being lost, a court of equity will compel payment of the amount secured, either with or without the execution of a proper instrument of indemnity against the claims of third parties, into whose hands the lost instrument may have fallen (*a*). And,

Secondly.—The cases of equitable relief against the defective execution of powers—a branch of equity far too subtle and intricate to admit of discussion on the present occasion (*b*).

Mistake alone remains.

Mistake may be said to exist in the legal sense, where a person acting upon some erroneous conviction, either of law or of fact, executes some instrument, or

(*a*) Consider the jurisdiction which was given to the common law courts, in cases of this kind, by 17 & 18 Vict. cap. 125, s. 87. As to the distinction, in reference to the jurisdiction in equity, between the “loss” and the “destruction” of a negotiable instrument, see *Wright v. Lord Maidstone*, 1 Kay & Johnson, 701.

(*b*) Sugden on Powers, 8th edition, chapter xi.

does some act which, but for that erroneous conviction, he would not have executed or done.

Now, in reference to "*mistake*," there is one point upon which the doctrines of the common law and of equity will be found agreeing in the main both with each other, and with the Roman law. It is this,—that while mistake as to law affords no ground for relief, mistake as to fact does. Thus in the Digest, under the title "*De juris et facti ignorantia*," we find the law thus laid down: "*Regula est, juris quidem ignorantiam* "*cuique nocere, facti vero ignorantiam non nocere*" (a). And the first illustration, given at the commencement of the title, of the distinction between ignorance of law and ignorance of fact may be freely rendered thus: —"*If a man be ignorant of the death of a kinsman* "*whose property is about to be dealt with, time shall* "*not run against him: otherwise, if he be aware of* "*the death and of his own relationship, but ignorant* "*of his consequent rights*" (b).

Of the existence of the rule, as part of our common law jurisprudence, the case of *Billie v. Lumley* (c) affords an apt instance. There, an underwriter, with knowledge of a fact which would have entitled him to dispute his liability under a policy of marine insurance which he had underwritten, but in ignorance of the legal

(a) Digest xxii. tit. vi. l. 9.

(b) The words of the original are as follows:—"*Nam si quis nesciat* "*decessisse eum, cujus bonorum possessio defertur: non cedit ei tempus.* "*Sed si sciat quidem defunctum esse cognatum, nesciat autem proximitatis* "*nomine, bonorum possessionem sibi deferri: aut si, &c.: cedit ei* "*tempus, quia in jure errat.*"

(c) 2 East, 469. See also *Kitchin v. Hawkins*, L. R. 2 C. P. 22.

rights resulting from that fact, paid the amount which he had assured; and subsequently brought an action to recover the money back. The Court of King's Bench held the action would not lie. Lord Ellenborough asked plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, and with full knowledge of all the *facts* of the case, he could recover it back again on account of his ignorance of the *law*. No answer was given; and his lordship subsequently said, "Every man must be taken to be cognisant of the law; otherwise, there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case."

This short observation contains, I conceive, the true ground for the distinction between mistake of law and mistake of fact. Probably, in a very large number of transactions there is at best but an imperfect knowledge of the real state of the law; and even where the knowledge really exists, few things could be easier to allege or harder to disprove than legal ignorance. Indeed, if mistake or misapprehension as to matter of law were admitted as a ground for reopening engagements solemnly entered into, it is difficult to see how any engagement could be relied on.

It must however be confessed, that when we proceed to the consideration of the cases in equity respecting "mistake," we find occasionally the line of demarcation between mistake of law and mistake of fact less distinctly drawn in equity than either by the Roman or by the common law. This has occurred more particu-

larly in those cases where, under special circumstances, combined with legal ignorance of a very glaring kind, the court has been induced to grant relief, and has apparently rested its judgment more or less on the mistake or ignorance of law. The oft-mentioned case of *Lansdowne v. Lansdowne* (a) is, perhaps, the fittest representative of this class of cases. There, the plaintiff, who was son of the eldest brother of a deceased intestate, had a dispute with his uncle, a younger brother, respecting the right to inherit the real estate of the deceased. It was agreed to consult a schoolmaster, named Hughes, who, in his turn, resorted for counsel to a book called the "Clerk's "Remembrancer," and finding the law as laid down in the book to be, "that land could not ascend, but always descended," he put the best exposition he could on these somewhat ambiguous words, and decided that the younger brother was entitled. Therefore, it was agreed that the son of the elder brother and the younger brother, his uncle, should share the lands, and a bond and conveyances were executed for the purpose of carrying out the agreement. The nephew subsequently filed his bill to be relieved; and Lord King, Chancellor, decreed that the bond and conveyances had been obtained by mistake and misrepresentation of the law, and ordered them to be given up to be cancelled. Lord King is reported to have said, in delivering judgment (b), that "That maxim of law, *Ignorantia juris non excusat*, was in regard to the Public, that Ignor-

(a) 2 Jacob & Walker, 205; s. c. Moseley's Reports, 364.

(b) Moseley's Reports, 365.

“ance cannot be pleaded in Excuse of Crimes, but did “not hold in Civil Cases.” This, however, is clearly not law at the present day (a).

The form of the decree in *Lansdowne v. Lansdowne*, viz., that the deeds should be delivered up, leads me naturally to the consideration of the superior efficacy of the equity jurisdiction in cases of “mistake.” Here, as in cases of “fraud,” we find the power of ordering the delivering up of the impeached instrument, imparting to the equitable jurisdiction a completeness vainly sought for at law. As respects the other ingredients of superiority which the equitable jurisdiction has been mentioned as possessing in cases of “fraud” over that at law, both of which exist also in cases of “mistake,” we may observe, that while, on the one hand, the discovery obtainable through the medium of the equity courts only was, perhaps, of somewhat less importance

(a) The high authority of Lord Westbury, has, however, been added to that of Lord King since the lectures were delivered. In *Cooper v. Phibbs*, Law Rep. 2 H. L., 149, Lord Westbury expressed himself (p. 170) thus:—“It is said, ‘*Ignorantia juris haud excusat*,’ but in that maxim ‘the word ‘*jus*’ is used in the sense of denoting general law, the ‘ordinary law of the country. But when the word ‘*jus*’ is used in the ‘sense of denoting a private right, that maxim has no application. “Private right of ownership is a matter of fact; it may be the result also “of matter of law; but if parties contract under a mutual mistake and “misapprehension as to their relative and respective rights, the result is “that that agreement is liable to be set aside as having proceeded upon a “common mistake.” It is difficult, however, to reconcile this assertion with the passages in the Digest referred to at p. 81, supra, and others of a similar character; and the proposition that a common misconception by two contracting parties in reference to matter of law affords no ground for impeaching the contract is substantiated by the recent decision of *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693; see observations of Lord Justice James at page 709.

in cases of "mistake;" so, on the other hand, the power to qualify, mould, and alter, instead of simply annulling and undoing, was, in cases of "mistake," of even greater importance. Take, as a specimen of mistake, the case of instructions given to prepare a settlement of the lands of a lady on the occasion of her marriage. Assume that, under special circumstances, it had been arranged that, after limitations to the lady and her husband for their lives, the property should go to such uses in favour of the children as the wife alone should, by deed or will, appoint; and that, inadvertently, the power of appointment was given to the husband and wife and the survivor, in the usual form. Now, what is wanted is not to *undo* the settlement, but merely to alter it and make it what the parties intended it should be. The deed requires to be "reformed," as the technical phrase is; and of the entire equity jurisdiction, derivable from the three heads of *fraud*, *accident*, and *mistake*, it would be difficult to name any portion which is more beneficial, or more judiciously exercised, than that of reforming deeds in cases of *mistake* (a).

Passing from the general subjects of fraud, accident, and mistake, to those heads of equity jurisdiction which admit of a more definite description, in reference either to the subject-matter of the suit or the nature of the remedy, the most satisfactory approach to classification seems to me to be that

(a) The Judicature Act, 1873, section 34, assigns to the Chancery Division of the Court causes and matters for, *inter alia*, "The rectification, or setting aside, or cancellation of deeds or other written instruments."

which I borrow mainly from Mr. Spence's work, viz. :—

First.—Cases in which, but for the interposition of equity, there would in substance be no remedy.

This class will include Partnership (*a*).

Secondly.—Cases in which the remedy at law was wholly inappropriate, including (*b*),—

1. Recovery of Specific Chattels.

2. Specific Performance.

Thirdly.—Cases in which the remedy at law, though not positively inappropriate, was less easy and convenient than in equity, including (*c*),—

1. Account.

2. Dower.

3. Partition.

Commencing with "Partnership," let us consider the position in which partners stand in reference to legal remedies only. Under the old law, an action of account lay by one partner against another. Thus, Coke, in his commentary on Littleton, says,—“As if
“two joynt merchants occupy their stocke goods and
“merchandizes in common to their common profit,

(*a*) The same Act assigns to the Chancery Division causes and matters for—“The dissolution of partnerships or the taking of partnership or
“*other accounts*.”

(*b*) There is no special assignment by the Judicature Act, 1873, of causes for the recovery of specific chattels, and the assignment to the Chancery Division in respect to specific performance is limited to causes and matters for “The specific performance of contracts between vendors and purchasers of *real estates*, including contracts for leases.”

(*c*) As to account, see note (*a*) supra. The Act does not mention “Dower,” but specially assigns to the Chancery Division causes or matters for “The partition or sale of real estates.”

“ one of them naming himself a merchant shall have
 “ an account against the other naming him a mer-
 “ chant, and shall charge him as, ‘ *receptor denari-*
 “ *orum ipsius B ex quâcunque causâ & contractu ad*
 “ *communem utilitatem ipsorum A & B provenien-*
 “ *sicut per legem mercatoriam rationabiliter monstrare*
 “ *poterit* ” (a).

But the remedy by action of account has long since become practically obsolete (b); and if we except the right of a partner, where partnership articles have been entered into under seal, of bringing an action of covenant against his co-partner for any breach of the articles, we may say without any material inaccuracy, that no right of action exists at law.

It could indeed not well be otherwise. Assume that one partner receives a sum of money, which *primâ facie* he is bound to pay into the partnership account, or of which he ought to pay one-half to his fellow partner, and that he omits to do his duty. Then let the aggrieved partner sue the defaulter. The answer to the action is obvious,—“ The rights of the partners
 “ *inter se* cannot be fairly ascertained, except by
 “ taking the accounts generally; and if an action of
 “ this kind is permitted, one partner may be com-
 “ pelled to pay to the other what, upon a perfect ad-
 “ justment of the relative rights and liabilities, might
 “ appear to belong to himself.” Where the partners have, upon a dissolution of partnership, met and ad-

(a) Coke Litt. 172.

(b) A short sketch of the common law action of account will be found in Lecture VIII.

justed an account (that is to say, actually taken their accounts themselves), then he who appears upon the result of those accounts to be the creditor of the other, may sue for the balance appearing to be due to him: in fact, "*cessante ratione cessat lex*;" but otherwise the court of law is powerless.

Let us now shortly state to what extent and in what way the equity courts aid the infirmity of those of the common law in partnership matters.

First.—The equity court will either, upon a dissolution, or with a view to a dissolution, of the partnership, order the necessary accounts to be taken, and give all directions for realising the partnership property; adjusting, at the same time, all questions of right of trading, indemnity to be given by one partner to the other, &c.

Secondly.—It will, at the instance of a partner, decree a dissolution of partnership, where the other partner has, by breach of the partnership articles or other misconduct, disentitled himself to any further continuance of the partnership; or when, through permanent ill-health or lunacy, he has become incapable of fulfilling his duties as partner (a).

(a) As to dissolution in event of lunacy of a partner, see *Besch v. Frolich*, 1 Phillips, 172; Anonymous case, 2 Kay & Johnson, 441; and *Leaf v. Coles*, 1 De Gex, Macn. & Gor. 171. If the dissolution is purely the act of the Court, founded on the permanent lunacy of the partner, it will take effect only as from the date of the decree, but where there is a right to dissolve (say by notice), which has been duly exercised, and the Court is merely asked to recognise and give effect to this right, the partnership will be declared to have been dissolved as from the date at which the dissolution was duly effected. See *Robertson v. Lockie*, 15 Simons, 285.

Thirdly.—It will, in case of necessity, *with a view to dissolution*, assume indirectly the management of the concern, by appointing a receiver; but it is now settled that it will not do this when a continuance of the partnership is contemplated (a).

Fourthly.—It will in certain cases direct accounts to be taken, even though a dissolution be not in contemplation (b).

When we compare these large remedial operations of the equity courts with the almost entire powerlessness of the common law, we might be almost tempted to speak of the equity jurisdiction in partnership matters as really *exclusive*.

We proceed to our second class,—in which, though the common law afforded somewhat more of remedy than in that just considered, yet the remedy itself was very inadequate.

And first, as respects the delivering up of “Specific Chattels.”

At law, if any article or chattel was wrongfully withheld from a man, his remedy was either by action of trover, or action of detinue. In the former case, he recovered the damages only. In the latter, the jury found the value of the chattels, and the judgment was for recovery of the chattel detained, or its value, as found by the jury, if the chattel were not returned; with damages in either case for the detention. In fact, the wrong-doer had the option of returning the chattel,

(a) See *Hall v. Hall*, 3 Macn. & Gor. 79.

(b) The authorities will be found collected and discussed in *Fairthorne v. Weston*, 3 Hare, 387.

or paying the value (*a*). But what real redress could this afford when the thing itself was wanted? Take the case of a rare monument of antiquity,—the famous Pusey Horn, for instance, said to be the same under which the Pusey family in Berkshire held their lands of Canute the Dane. What damages could compensate for the loss of such a relic? Or, to imagine an illustration which, at the present moment, will go home to the heart of each of you; suppose that, some fifty years hence, a sword of honour,—a tribute of the present generation to him who has made the name of “Havelock” part of our history,—should be wrongfully withheld from some grandson of that brave man. Could any damages do justice? Well, in cases of this sort the equity courts supplied, and still supply the very remedy required.

They did so at an early though not very clearly

(*a*) See the question as to the proper form of verdict learnedly discussed in *Williams v. Archer*, 5 Common Bench R. 318; and in *Phillips v. Jones*, 15 Queen’s Bench R. 859. The Common Law Procedure Act, 1854, 17 & 18 Vict. cap. 125, s. 78, conferred a new jurisdiction to compel specific delivery of the chattels; but the power of compulsion was by distress only, and therefore less efficacious than that in equity.

Now, by the operation of the Judicature Acts, 1873 and 1875, there is but one Court and one process, and :

By Order xlii., rule 4, of the Rules of the Supreme Court, 1875, it is provided as follows :

A judgment for the recovery of any property other than land or money may be enforced ;

By writ for delivery of the property.

By writ of attachment.

By writ of sequestration.

And, by Order xliv., rule 1, a writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.

defined date. In the time of Edward the Fourth, the question whether the court would give relief when title deeds were wrongfully detained, appears to have been still doubtful. We find a bill of this kind (with the answers and replications), of that monarch's reign, in the preface to the second volume of "The Calendars of Proceedings in Chancery" (a); but in the year-book of the 9th Edward IV. (b), an instance is mentioned in which the plaintiff was sent to common law, *where he might have writ of detinue*.

In later times we find the case of *Pusey v. Pusey* (c), in which the subject-matter of litigation was the very Pusey Horn of which I spoke to you just now; and later still, in the year 1735, a case of *Duke of Somerset v. Cookson* (d), in which Lord Chancellor Talbot decided that a bill would lie by the plaintiff, lord of the manor, against defendant for delivery up of an old silver altar with a Greek inscription.

Next, as to specific performance. Here, again, the remedy at law was damages only, and in many cases wholly inadequate. A man purchased a piece of land near his house; on the strength of his purchase, he proceeded perhaps to arrange various alterations as respects buildings and pleasure grounds; probably he modified even his internal family arrangements. Perchance, he actually took possession and paid part of

(a) P. cxiv.

(b) Pl. 41.—Mr. Spence mentions, Eq. Jur. vol. i. 643, note (b), instances of bills for the delivery up of a gilt cross, a crucifix (Henry the Eighth's time), and a crimson bed (in the time of Philip and Mary); but I have been unable to verify the authorities to which he refers.

(c) 1 Vernon, 263; anno 1684.

(d) 3 Peere Williams R. 389.

the purchase-money; yet, if before actual conveyance, differences arose between his vendor and himself, he was *at law* entirely in the power of the former. He might be ejected, and no amount of inconvenience, hardship, or mortification could entitle him at law to anything beyond *damages*. No country pretending to anything like a system of civilized jurisprudence could tolerate such a state of things. Accordingly, equity stepped in, and said, "These contracts must be performed." This, indeed, it did at a very early period (a).

It has been occasionally the subject of observation, that the Court of Chancery, while interfering to rescue our jurisprudence from the disgrace of allowing contracts for sale of land to be violated upon payment of damages only, has erred rather in treating the time stipulated for performance of the contract as generally immaterial. Thus, as you are probably aware, if A sell land to B, and it be expressly stipulated that the contract shall be completed on a certain day, the default of either party in respect of time, does not *prima facie* entitle the other to rescind the contract. To use the technical phrase, time is not deemed of the essence of the contract (b). It may be admitted perhaps that

(a) The second case mentioned in the preface to the 2nd volume of the *Calendars of Proceedings in Chancery*, is a bill for specific performance (the date being Richard the Second's Reign); and at page xxvi. of the same preface there is another instance.

(b) There are certain well-established exceptions to the general rule—as where the subject-matter of contract is a mining lease, *Macbryde v. Weekes*, 22 Beavan, 533; or a life annuity, *Withy v. Cottle*, *Turner & Russell*, 78; or a public-house sold as a going concern, *Cowles v. Gale*, *Law Rep.* 7 Ch. App. 12.

the equity courts have gone rather far in this respect, in interfering with the contracts of parties. Still, the error may well be forgiven, in consideration of the beneficial nature of the jurisdiction; and most of the objectionable results of the general rule in reference to time are avoided by the practice of conveyancers, who, whenever settling a stipulation in respect of which time is to be essential, add the words, "*and in this respect, time shall be deemed to be of the essence of the contract*" (a).

I proceed to the third class of cases in which the remedy at law, though not positively inappropriate, was less easy and convenient than that in equity, embracing (I repeat the subdivisions)—

1. Account.

2. Dower.

3. Partition.

Account has been reserved for special and more

(a) The late Lord Cranworth entertained strong opinions that the equity courts had gone to the utmost allowable limits in their interference with the stipulations of contracts in regard to time: opinions which, in one case (*Parkin v. Thorold*, 2 Simons, N.S. 1, reported on the hearing at the Rolls, 16 Beavan, 59), led him to a decision practically at variance with doctrines of the court. But though the tendency of the modern decisions generally may have been to narrow the rule by means of exceptions such as those alluded to in the last previous note, it still remains firmly established. See *Roberts v. Berry*, 3 De Gex, Macn. & Gor. 284, and the judgment of the Lords Justices Knight Bruce and Turner in *Wells v. Maxwell*, 33 Law Journal (N.S.) Chanc. 44.

The Judicature Act, 1873, by section 25, sub-section 7, enacts as follows:—"Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

detailed consideration in my eighth lecture; and I pass therefore at once to "Dower."

You know of course what "Dower" was. It was the wife's right to have for her life, after her husband's death, one third part of any lands and tenements of which the husband was at his death, or had been at any time during their coverture, seised in fee simple or in fee tail.

The origin of this right of the widow has been the subject of much discussion. It was not originally derived from the feudal system, for its introduction into that system some time after it had formed part of the English law can be clearly traced (*a*). Blackstone assigns a Danish original to it (*b*).

Our concern here, however, is not with the history and general incidents of dower, but merely with the widow's remedy for enforcing her right. The course pointed out by Magna Charta was that the widow should remain in her husband's capital mansion-house for forty days after his death, during which time her dower should be assigned to her. This assignment it was the duty of the heir, or, if the heir were under age, then of his guardian, to complete (*c*). After assignment, the widow had a right of entry, and, after entry, held of the heir by a kind of sub-infeudation. But the heir or guardian might neglect to assign, and in this case the widow's remedy at law was by a writ of dower.

(*a*) 2 Bl. Com. 129.

(*b*) Ibidem.

(*c*) See at Appendix F, a precedent of assignment of dower by the heir, extracted from the "Perfect Conveyancer," printed in 1655.

Hitherto we have assumed that the husband died seised. But it must be recollected that the widow's title to dower applied as well to lands which the husband had conveyed away during the coverture, as to lands of which he died seised ; and probably upon investigation, a very large proportion of the litigated cases of dower would be found to be those in which the husband had conveyed away the land. Here, too, the remedy at common law was by writ of dower. But the widow's remedy at law was very imperfect. Her chief difficulty in asserting her rights would obviously be her ignorance of the facts on which her right to dower depended. Without knowing the contents of the deeds under which her husband derived title, she would neither know whether the estate taken by him was such as to entitle her to dower, nor with sufficient accuracy the precise lands. And in those cases in which the land had been conveyed away by the husband in his lifetime, the widow was especially helpless from her ignorance. This ignorance the equity courts aided by the exercise of their powerful engine "Discovery," compelling the heir or alienee to answer on oath detailed interrogatories, put to him for the purpose of ascertaining the true facts respecting the title and situation of the lands.

Discovery, indeed, may be said to have been the foundation of the equity jurisdiction in reference to dower. There were other causes, however, which tended to confirm the jurisdiction. Amongst them may be mentioned the circumstance that, upon the death either of the tenant or of the widow before assessment of

damages for withholding her dower, the right to the damages was at law lost; whereas a court of equity would decree what was due upon the result of the account to be paid either *by* the representative of the heir, or *to* the representative of the widow. This was the point decided by Lord Alvanley, in the celebrated case of *Curtis v. Curtis* (a), the judgment in which ought to be read and re-read by every one who wishes to gain correct notions respecting the equitable jurisdiction in cases of dower.

Again, under the law as it existed previously to the recent Act for the extinguishment of satisfied terms (b), where the widow sued at law for dower against the heir or devisee, and there happened to be a satisfied term of years created antecedently to her title of dower accruing, all that the widow could obtain at law was a judgment with a stay of execution (*cesset executio*) during the continuance of the term—in substance a fruitless judgment. In these cases she came to a court of equity, and the term was removed out of her way. For these combined reasons the Court of Equity assumed and still exercises an independent concurrent jurisdiction in reference to dower.

The case of dower is indeed a peculiarly apt instance of “*concurrent jurisdiction* ;” for you must bear in mind that until the late Dower Act, the wife was not dowerable out of equitable estates, though the husband had his curtesy thereout; so that, previously to that

(a) 2 Brown's Chancery Cases, 620.

(b) 8 & 9 Vict. cap. 112.

Act, the wife necessarily came relying upon a purely legal title.

One remaining observation respecting dower. The late Statute of Limitations (a), when sweeping away some forty forms or so of real action, whose uncouth names may be read in the thirty-sixth section, yet retained, together with "*quare impedit*," the writ of "*dower*," and writ of "*right of dower*," the only three real actions now remaining (b). In practice, however, the common law action, though not obsolete, is very rarely resorted to (c).

Partition alone remains.

Partition may be said to be a legal remedy for the inconveniences of the most inconvenient of all species of ownership, viz., that in undivided shares.

Of this class of ownership there are three kinds, viz. :—

1. Coparcenary, which arises where, upon the death of a person intestate leaving several co-heirs, the land descends to these co-heirs as co-parceners.

2. Joint tenancy, which occurs where property is limited to two or more persons without words of division.

(a) 3 & 4 Will. IV. cap. 27.

(b) These actions were in effect, by 23 & 24 Vict. c. 126, s. 26, abolished as real actions.

(c) The only reported modern instances of resort to the common law jurisdiction are, so far as I am aware, *Garrard v. Tuck*, 8 Common Bench R. 231 (which appears to have resulted in a compromise), *Gomm v. Parrott*, 3 Common Bench Rep. N.S. 47, and *Woodward v. Dowse*, 10 Common Bench Rep. N.S. 722, which last case was subsequent to the 23 & 24 Vict. c. 126.

3. Tenancy in common, where property is limited to several, with words added, defining the aliquot shares in which they are to take.

I intimated that the inconveniences of this class of ownership were great ; let me advert to a few.

Each co-parcener, joint-tenant, or tenant in common, had and has a right to enter upon every part of the land. If there were a house, for instance, each would be entitled to enter upon and partake in the occupation of every room in it. Again, each owner might receive the whole rents and profits, and the only remedy which the law gave was by an action of account (a). It might, indeed, be said almost that, except in the case of an actual expulsion of one owner by the other or others, there was no remedy of any value short of partition.

Thus Littleton (b), after having pointed out in the previous section that one tenant in common might have an action of ejectment against the other, *if the other put him out of possession and occupation*, proceeds to state that no action of trespass, “ *Quare clausum suum*

(a) See *Thomas v. Thomas*, 5 Exchequer, 28, where it was held that an action for money had and received will not lie. And where one tenant in common merely occupies and enjoys the land, as by farming at his own risk, no action of account lies at law in favour of the co-tenant. See *Henderson v. Eason*, 17 Queen's Bench Rep. 701, in Exchequer Chamber, overruling the previous decision of the Queen's Bench. Nor is there any remedy in equity in such a case—*Henderson v. Eason*, 2 Phillips, 308 ; a result which, notwithstanding the observations in the judgment of Parke, B., in Exchequer Chamber, and Lord Cottenham's decision, can hardly be viewed as satisfactory. But where a tenant in common occupies in exclusion of an *infant* co-tenant, he is chargeable in equity with an occupation rent ; *Pascoe v. Swan*, 27 Beavan, 508.

(b) Sect. 323.

“*fregit et herbam suam, &c., conculcavit,*” will lie by one against the other, for that each may enter and occupy in common the lands and tenements which they hold in common; that is to say, in substance, each might use or abuse the land “*ad libitum.*”

In the case of an undivided ownership of chattels personal, the legal results were and still are even more inconvenient (a). Thus, in the same section, Littleton continues in these words: “but if two be possessed of “chattells personalls in common by divers titles, as of “an horse, an oxe, or a cowe, &c., if the one take the “whole to himselfe out of the possession of the other, “the other hath no other remedie but to take this from “him who hath done to him the wrong, to occupie in “common, &c., *when he can see his time.*”

The position of the parties sometimes was, and might even now still be, that which is ludicrously described in the American story, viz.: Two men are tenants in common of an elephant, and one declines either to pay anything to the other in the shape of profits of exhibition, or to buy his co-owner's share, and is at last brought to reason only by the threat of the injured party to shoot his undivided moiety (b).

(a) And for these inconveniences there is no remedy, equitable or legal.

(b) Notwithstanding the humour of the story, it must be taken to be clear as a matter of law, that if the threat had been carried into execution, the shooter would have been liable in damages to the extent of one moiety of the difference in value between the live and the dead elephant. In fact, destruction of the chattel is, in reference to undivided ownership of chattels personal, the analogous case to actual expulsion in the case of land. Thus Lord Coke in his commentary on Littleton says:—“If two “tenants in common be of a dove-house, and the one destroy the old “doves, whereby the flight is wholly lost, the tenant in common shall

You must, I think, by this time, be sufficiently satisfied that some remedy was wanted against the inconveniences of undivided ownership. The common law, however, afforded none, except in the case of *coparceners*, for whose benefit there lay a writ *de partitione faciendâ*. Joint tenants and tenants in common were obliged, until the reign of Henry VIII., to bear their fetters as they best could. No doubt good sense and agreement of the parties mitigated the defect of the law (a). The absence, however, of any power of compelling a partition in the case of joint-tenants, and tenants in common was by the time of Henry VIII. felt to be an evil calling for legislative interference; and accordingly by the 31st Henry VIII. cap. 1, joint-

“ have an action of trespasse, *quare vi et armis columbare le plaintiff*
 “ *fregit et ducentas columbas pretii 40s. interfecit per quod volatum*
 “ *columbaris sui totaliter amisit*, for the whole flight is destroyed, and
 “ therefore he cannot in bar plead tenancie in common.” Upon the question, how far a tenant in common, who does not actually destroy the common chattel, but merely sells it, is liable to his co-owner, see *Mayhew v. Herrick*, 7 Common Bench R. 236. And see further, *Fraser v. Kershaw*, 2 Kay & Johnson, 496.

(a) We find mentioned in Littleton a great variety of different modes of partition by agreement. It may be not uninteresting to hear him tell one of them in his own words :—

“ Another partition or allotment is, as if there be four parceners, and
 “ after partition of the lands be made, every part of the land by itself is
 “ written in a little scrowle and is covered all in waxe in manner of a
 “ little ball, so as none may see the scrowle, and then the four balls of
 “ waxe are put in a hat to be kept in the hands of an indifferent man,
 “ and then the eldest daughter shall first put her hand into the hat, and
 “ take a ball of waxe with the scrowle within the same ball for her part,
 “ and then the second sister shall put her hand into the hat and take
 “ another, the third sister the third ball, and the fourth sister the fourth
 “ ball, &c., and in this case every one of them ought to stand to their
 “ chance and allotment.”—*Littleton*, sect. 246.

tenants and tenants in common of estates of inheritance were made compellable to partition; and by the 32nd Henry VIII. cap. 32, joint-tenants and tenants in common for life or for years were placed in the same position.

Still the proceedings at law were deficient in power of adaptation to the circumstances of the different cases arising. The procedure was as follows:—The plaintiff sued out the writ of partition. There was a judgment that partition should be made; and then a writ issued to the sheriff to summon a jury and make partition (*a*). But the sheriff had no power, however desirable it might be, to divide the land unequally, and award payment by one owner to the other of money for equality of partition (*b*). And although so late as the reign of William III. we find an Act of Parliament passed expressly for the purpose of regulating the common law procedure in partition cases, yet the equity jurisdiction, which would seem to have been first assumed towards the end of the reign of Queen Elizabeth (*c*), gradually gained ground upon that at common law, until the common law writ of partition became rather a matter of antiquarian interest than of practical importance. Finally, in the year 1833 (*d*), the Legislature, when abolishing, with the three exceptions above adverted

(*a*) See form of writ stated, Coke Litt. 167 (*b*).

(*b*) And in equity, an express direction in the decree is necessary to authorise the commissioners to award sums for owelty of partition. See *Mole v. Mansfield*, 15 Simons, 41.

(*c*) See *Speke v. Walrond, Tothill*, 155.

(*d*) See 3 & 4 W. IV. cap. 27, s. 36.

to (a), all real actions, included amongst the abolished forms the writ of partition, and thus, by Act of Parliament, gave to the Court of Equity exclusively a jurisdiction which had long belonged practically to equity alone. Thus, the jurisdiction in partition might be now said to be *exclusive*; but having regard to its history, it is properly, and more conveniently, included as a head of *concurrent* jurisdiction.

One defect there was, indeed, to which the equitable jurisdiction in matters of partition was, until quite lately, equally with that at law, subject. It was this; there was no power to decree a partition of copyhold land. Where a mixed inheritance of freeholds and copyholds was held in undivided shares, the court might decree a partition in a qualified sense by giving all the copyholds to one, and adjusting the rights by directing payment of money for equality of partition (b). But where the *whole* of the property was copyhold, there were technical difficulties in reference to binding the rights of the lord of the manor; and the late Vice-Chancellor of England, in the case of *Horncastle v. Charlesworth* (c), expressly decided that a bill would not lie in equity for the partition of copyholds.

This defect, or supposed defect, of jurisdiction was, however, remedied by the Copyhold Enfranchisement Act, passed in the year 1841 (d), by which it was enacted and *declared*, that it should be lawful for courts of equity

(a) Page 97, *supra*.

(b) See *Dillon v. Coppin*, 6 Beavan, 217, note (a).

(c) 11 Simons, 315; see, too, *Joze v. Morshead*, 6 Beavan, 213.

(d) 4 & 5 Vict. cap. 35, s. 85.

to make the like decree for ascertaining the rights of the parties, and issuing a commission to make partition, as by the practice of the court might be made with respect to lands of freehold tenure.

The equity procedure in partition suits differed little, if at all, during the growth of this head of jurisdiction, from what it is at the present day. It is now as follows:—The plaintiff seeking a partition files his bill, bringing before the court the owners of the other undivided shares. Upon the right to a partition being established at the hearing, the form of decree is, that a commission do issue (*a*) to commissioners to divide the estate, and that the parties do execute mutual conveyances. The commission issues. The commissioners divide the estate and make their return to the commission, setting forth the division made by them; and upon the return coming in, mutual conveyances (*b*) are executed in conformity with the division made by the commissioners (*c*).

(*a*) Under the more recent practice the decree declared the right, and proceeded to direct that proposals for a partition be laid before the Judge at Chambers; see *Clarke v. Clayton*, 2 Giffard, 333.

(*b*) By means of the 30th section of the Trustee Act, 1850 (13 & 14 Vict. cap. 60), a statutory conveyance may now be obtained, even where parties under disability are interested, *Bowra v. Wright*, 4 De Gex & Smale, 265. And see *Shepherd v. Churchill*, 25 Beavan, 21.

(*c*) The remedies of co-owners have received a large, and, on the whole, beneficial extension by the Partition Act, 1868 (31 & 32 Vict. cap. 40), which, in effect: first (by sect. 3) *authorises* the Court of Chancery (upon the request of any person interested, notwithstanding dissent or disability of the others) to decree a sale in the event of special circumstances rendering a sale more beneficial than partition; *Driukwater v. Radcliffe*, L. R. 20 Eq. 528; secondly (by sect. 4), *directs* the Court, upon the request of

My *classified* heads of equity are now exhausted ; but there remains yet one subject of equity jurisprudence which it is impossible to range accurately within any one of the other classes mentioned, and which nevertheless demands some notice. I mean, *Set-off* (a).

By the civil law, if A was indebted to B, and before he discharged his liability B became indebted to him, what was called "*compensation*" took place ; that is to say, A's liability to B became "*ipso facto*" extinguished, partially or wholly, according to the amount of B's liability to him. This doctrine of compensation was founded on a principle of natural equity or good sense, which forbids that a man should be compelled to pay one moment what he will be entitled to recover back the next ; or, to use the words of the civil law, "*Ideo compensatio necessaria est, quia interest nostrâ potius non solvere, quam solutum repetere*" (b). The same

persons beneficially interested to the extent of a moiety, so to decree, unless it sees good reason to the contrary ; *Pemberton v. Barnes*, L. R. 6 Ch. 685 ; *Rowe v. Gray*, 5 Ch. D. 263 ; *Porter v. Lopes*, 7 Ch. D. 358 ; and thirdly (by sect. 5), *authorises* the Court to decree a sale upon the request of any person interested, unless the other persons interested undertake to purchase the share of the person requesting ; see *Gilbert v. Smith*, 8 Ch. D. 548 ; 11 Ch. D. 78.

The first of these enactments is, it is believed, only in accordance with the codes of most foreign countries. The corresponding provision of the Code Civil, Art. 827, is as follows : "*Si les immeubles ne peuvent pas se partager commodément il doit être procédé à la vente par licitation devant le tribunal.*"

(a) The portion of the Lecture as to "*set-off*" has ceased now to have any practical legal importance, but it is retained on account of its historical interest.

(b) Dig. xvi. tit. ii. l. 3.

doctrine exists in those systems of jurisprudence which are grounded on the Roman law (a).

Now, the common law utterly refused to recognise this principle of justice. If B owed A money, and A owed B money, A was entitled to recover from B, although the amount of his own debt was greater, and although he might himself be in insolvent circumstances; and thus, by being first in the race, he might obtain judgment and payment of the amount recovered, leaving B to sue subsequently for his own debt, and recover a judgment of his own, bearing no fruits. Nay, even if A had actually become bankrupt, so that his assignees had become entitled to what was owing from B, the law allowed A's assignees to recover from B the whole amount, leaving B to go in under the bankruptcy and prove against A's estate, and recover a dividend only. The glaring injustice of this result in cases of bankruptcy, led to the first legislative mitigation, viz., that effected in Anne's reign (b), of allowing a set-off in cases of mutual credit and mutual debts between the bankrupt and any person (c).

About a quarter of a century later, by a short and

(a) See, for instance, the section on "*Compensation*," beginning Art. 1289 of the French "*Code Civil*."

(b) This statute is commonly referred to as 4 Anne, cap. 17, according to the order in which it appears in Ruffhead's Edition, where nothing beyond the title is given. In the edition of statutes published by the Record Commission, where the statute is given at length, it appears as 4 & 5 Anne, cap. 4. It was repealed by the Statute Law Revision Act, 1867.

(c) The 39th section of the "Bankruptcy Act, 1869" (32 & 33 Vict. cap. 71), may be said to be the legitimate descendant of this first enactment in mitigation of the common law doctrines.

unobtrusive section, in an Act which is entitled “An Act for the Relief of Debtors, with respect to the imprisonment of their persons” (a), a most important alteration was effected in the law, by enacting, that, in cases “of mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator and intestate and either party, one debt may be set off against the other.” And it is under this enactment, as made perpetual and extended by a subsequent Act (b), that the right of set-off still exists at law (c).

Such is the short history of the right of “set-off” at common law.

To perform what is more particularly my duty, viz., to give a short account of *Set-off*, as a head of equitable jurisdiction, is by no means so easy. Indeed, the views which have been judicially expressed respecting *set-off* in equity, by judges of considerable authority, would deprive it altogether of its position as a distinct head of concurrent equity jurisprudence.

Lord Mansfield, in a passage which has been often quoted, thus expresses his views on the subject (d):—

“*Natural Equity* says, that cross demands should compensate each other, by deducting the less sum

(a) 2 Geo. II. cap. 22, s. 13.

(b) 8 Geo. II. cap. 24, ss. 4, 5.

(c) See now note (e) at page 110, *infra*.

(d) *Green v. Farmer*, 4 Burrow, 2214; see page 2220.

“ from the greater ; and that the *difference* is the only
“ sum which can be *justly* due.

“ But *positive law*, for the sake of the forms of
“ proceeding and convenience of trial, has said that
“ each must sue and recover,—separately, in *separate*
“ *actions*.

“ It may give light to this case and the authorities
“ cited, if I trace the law relative to the doing complete
“ justice in the *same* suit, or turning the defendant
“ round to *another* suit, which under various circum-
“ stances may be of no avail. Where the nature of
“ the employment, transaction, or dealings necessarily
“ constitutes an account consisting of receipts and pay-
“ ments, debts and credits, it is certain that only the
“ *balance* can be the debt ; and by the proper forms
“ of proceeding in courts of law or equity, the balance
“ only can be recovered.

“ *After* a judgment, or decree ‘to account,’ both
“ parties are equally actors.

“ Where there were *mutual* debts *unconnected*, the
“ law said they should not be set-off ; but each
“ must sue. And courts of equity followed the
“ same rule, because it was the law ; for, had they
“ done otherwise, they would have stopped the course
“ of law, in all cases where there was a mutual
“ demand.

“ The natural sense of mankind was first shocked at
“ this, in the case of *bankrupts* : and it was provided for
“ by 4 Anne, cap. 17, s. 11 ; and 5 Geo. II., cap. 30,
“ s. 30. This clause must have, everywhere, the *same*
“ construction and effect, whether the question arises

“ upon a summary petition, or a formal bill, or an
“ action at law. There can be but one right con-
“ struction : and therefore if courts differ, one must
“ be wrong.

“ Where there was *no* bankruptcy, the injustice of
“ not setting-off (especially after the death of either
“ party) was so glaring, that Parliament interposed,
“ by 2 Geo. II., cap. 22 ; and 8 Geo. II., cap. 24, s. 5.
“ But the provision does not go to goods or other
“ specific things wrongfully detained ; and therefore
“ neither courts of law nor equity can make the plain-
“ tiff who sues for such goods pay first what is due to
“ the defendant ; except so far as the goods can be
“ construed a *pledge* ; and then the right of the
“ plaintiff is only to redeem.”

In reference to the particular passage in which Lord Mansfield observes, *equity followed the same rule, because it was the law*, we must of course bear in mind his Lordship’s anxiety on all occasions to assimilate, nay, almost to fuse, “law and equity.”

However, some eight years or so before the judgment of Lord Mansfield, which has just been quoted, we find Sir Thomas Clarke, Master of the Rolls, who was well acquainted with the doctrines of equity, referring the] equitable doctrines to the Roman law (*a*). In this case, which is very ill reported, after adverting to the Roman law, and then to the English statute law, in a mode calculated to throw some doubt upon the

(a) See *Whitaker v. Rush*, Ambler, 407.

meaning of the passage which we proceed to quote, the Master of the Rolls continues thus:—

“Equity took it (*a*) up, but with limitations and “restrictions; and required, that there should be a “connexion between the demands.”

And, on a late occasion (*b*), Lord Justice (then Vice-Chancellor) Turner, after referring to two cases (*c*), in which questions as to *set-off* (or rather *stoppage*, to adopt the precise word used) came in question previously to the earliest statutory enactment respecting set-off, expresses himself thus: “It is clear, therefore, that the rights of debtors and creditors, in “cases of cross demands between them, as their “rights subsisted in equity, were not derived from or “dependent upon any statutory right of set-off; and, “on the other hand, it seems not to be improbable “that the statutory rights were derived from the “equitable rule.”

With such an expression from so high an authority, it was of course impossible to omit all notice of “set-off” from a general review of the concurrent equity jurisdiction; but there will be little inaccuracy in saying that, in reference to cross demands of a purely legal nature, no jurisdiction is practically exercised in equity.

(*a*) *i.e.* as I understand the judgment, “the rule as to set-off,” originally existing in the Roman law, and partially introduced into the English law by statute.

(*b*) *Freeman v. Lomas*, 9 Hare, 112. Lord Justice Turner, in his judgment in this case (see p. 113), intimates his opinion that the report of *Whitaker v. Rush* is erroneous.

(*c*) *Curson v. African Company*, 1 Vernon, 121; *Peters v. Soame*, 2 Vernon, 428.

Important questions of set-off do undoubtedly come before the equity courts for decision where one or both of the cross demands is purely equitable; as, where A being indebted to B, B assigns the debt (which, as a *chose in action*, is not assignable at law (a) to C; and then, subsequently, A sues C upon a legal debt owing to him from C. Here, A is creditor of C *at law*, and C is creditor of A *in equity*. At law C would have no right of set-off; but he files his bill in equity, and obtains it. The case of *Clark v. Cort* (b) is a good sample of the exercise of the equitable jurisdiction in instances of this kind (c); and that of *Cavendish v. Geaves* (d) will be found to contain some important principles, laid down by the present Master of the Rolls, in reference to equitable set-off.

With this exceptionally circumstanced head of equity, my notice of the concurrent jurisdiction of the court must end (e).

(a) See now Supreme Court of Judicature Act, 1873, sect. 25, sub-sect. (6), whereby, subject to compliance with certain provisions as to notice, a debt is assignable at law.

(b) *Craig & Phillips*, 154.

(c) See also *Unity, &c., Association v. King*, 25 *Beavan*, 72; and as to setting-off a debt due to a testator against a share of residue bequeathed to the debtor, see *Bousfield v. Lawford*, 33 *Law Journal* (N.S.) *Chanc.* 26.

(d) 24 *Beavan*, 163.

(e) The Judicature Acts, 1873 & 1875, have now conferred on defendants far more extensive rights in respect to set-off and counter claims than were enjoyed in equity. By Order xix., rule 3, of the Rules of the Supreme Court, which is a repetition of rule 20 of the Schedule to the Act of 1873, and which should be read in connection with sub-sections 3 and 5 of section 24 of that Act, it is provided as follows:—

“A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off

X { “ or counter-claim sound in damages or not, and such set-off or counter-
“ claim shall have the same effect as a statement of claim in a cross
“ action, so as to enable the Court to pronounce a final judgment in the
“ same action, both on the original and on the cross claim. But the Court
“ or a judge may, on the application of the plaintiff before trial, if in the
“ opinion of the Court or judge such set-off cannot be conveniently disposed
“ of in the pending action, or ought not to be allowed, refuse permission
“ to the defendant to avail himself thereof.”

LECTURE VI.

THE division of equity jurisprudence reserved for this evening's lecture is one which, in practical importance, occupies a very different position from that which it held only a few years since.

Of the *auxiliary jurisdiction* of the court it may be said that it has diminished, is diminishing, and may probably, ere long, under the amending hand of the Legislature, vanish altogether (a). Nor can this be properly a subject for regret. That our common law tribunals should, in matters peculiarly within their own cognisance, need the aid of equity courts to enable them to do justice efficiently, must surely be a reproach to our judicial system.

In the division of equity which was treated in the last preceding lecture, viz., *the concurrent jurisdiction*, considerable difficulty occasionally occurs in determining whether the circumstances of the case in hand do in fact bring it within some head of concurrent jurisdiction; but so soon as this difficulty has been sur-

(a) Upwards of seventeen years were needed for the fulfilment of this expectation, which was accomplished by the Judicature Act, 1873, which came into operation in November, 1875. The Lecture, though no longer of much practical importance, possesses, it has been considered, sufficient interest to warrant its republication.

mounted, the equity court takes entire cognisance of the matter. Sometimes, no doubt, the suitor may make a wrong selection of tribunal, and be turned round to law. But this is merely an occasional and not an inseparable incident of the concurrent jurisdiction.

Not so in the *auxiliary jurisdiction*. In cases which fall within its ambit, the remedy prescribed for the unfortunate suitor by our conjoint jurisprudence is, a certain amount of *law* and a certain amount of *equity*; and one may say, with perfect impartiality, that neither imparts a relish to the other.

While then, as a member of the Chancery bar, I might be pardoned some lurking feelings of regret at witnessing the decline of any head of equity jurisdiction, honesty and good sense call upon me to hail the change as one decidedly beneficial to the community at large.

But, notwithstanding the decline alluded to, it must be some time yet before any one undertaking to give a sketch of equity jurisprudence can venture to omit all notice of the *auxiliary jurisdiction* of the court; and I am not without hope that what I have to say this evening will prove not only valuable in perfecting your theoretical notions respecting equity, but also practically useful.

Now the cases in which equity merely assisted the law without assuming entire jurisdiction over the matter, may be conveniently classed as follows:—

Firstly. Cases in which equity aided the infirmity of the law in regard to evidence, comprising—

- (1.) Discovery.
- (2.) Perpetuation of Testimony.
- (3.) Examination of Witnesses *de bene esse* (a).

Secondly. Cases in which equity aided the infirmity of the law, *either* by repressing needless and vexatious litigation at law where the right appeared to have been sufficiently tried there, as in bills of peace; *or* by providing for a fair and sufficient trial in the proper *forum*, as in the case of bills to establish wills (b).

(a) This phrase is intended to include the examination of witnesses who are abroad.

(b) The old head of jurisdiction exercised in the case of bills for a receiver of personal estate *pendente lite* in the Ecclesiastical Court, was strictly of an *auxiliary* kind. The leading features of the principles and practice under this head of jurisdiction may be found collected in the following cases, or in those there cited :—*Watkins v. Brent*, 1 Mylne & Craig, 97; *Marr v. Littlewood*, 2 Mylne & Craig, 454; *Rendall v. Rendall*, 1 Hare, 152; *Whitworth v. Whyddon*, 2 Macn. & Gor. 52; *Barton v. Rock*, 22 Beavan, 81. But under the Act 20 & 21 Viet. cap. 77, the Court of Probate had power (by sect. 70), pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, to appoint an administrator of the personal estate of such deceased person; and, although the jurisdiction of the Court of Chancery to appoint a receiver was not put an end to, a stronger case for the appointment was needed to be made than before the Act; *Hitchen v. Birks*, L. R. 10 Eq. 471. And when an administrator *pendente lite* had been appointed by the Court of Probate, after bill filed for a receiver, the Court of Chancery refused to appoint a receiver; *Veret v. Duprez*, L. R. 6 Eq. 329. On the other hand, the Court of Probate would appoint an administrator *pendente lite*, if it was just and proper so to do, although a receiver might have been already appointed by the Court of Chancery. *Tichborne v. Tichborne*, L. R. 1 P. & D. 730. The occasions for resort to the jurisdiction of the Court of Chancery under this head became, therefore, after the passing of the Act, very rare. There must, however, be a suit pending in the Court of Probate to found the jurisdiction of that Court, and if there were no suit pending there, the Court of Chancery exercised its old jurisdiction; *Parkin v. Seddons*, L. R. 16 Eq. 34.

Let us take the *first* subdivision of the *first* class, viz., Discovery.

In order to appreciate accurately the necessity for the auxiliary jurisdiction of equity in affording discovery, we must cast a short retrospect upon the law of evidence as it existed previously to the recent changes.

The general rule, as established at the time when Bentham wrote, was that every person interested in the pending litigation was disqualified from giving evidence. Bentham, I believe, first pointed out that, *as a rule*, no witness ought to be disqualified on account of *interest only*, and that the objection to the evidence of an interested person ought to be treated not as an objection to the *reception* of his evidence, but merely as detracting from its *weight* when received.

After seeing the general rule of the old law first broken in upon in 1833 by the Common Law Amendment Act of that year (*a*), which provided, in substance, that witnesses might be examined notwithstanding objection made that a verdict or judgment in the action would afterwards be admissible in evidence for or against themselves; and then annulled in 1843 by Lord Denman's Act (*b*), which made interested persons good witnesses, *as the rule*, though retaining special instances of disqualification on the ground of interest, as in case of the parties plaintiff and defendant themselves; we at last, some six years back (*c*), witnessed the final triumph of Mr. Bentham's views. The Act

a) 3 & 4 Will. IV. cap. 42, ss. 26, 27.

b) 6 & 7 Vict. cap. 85.

c) The lectures were read in 1857-58.

then passed (a) rendered, with a few exceptions (b), even plaintiffs and defendants competent and compellable to give evidence.

Now you will have observed that the persons whose evidence was thus excluded under the old law, may be ranged into two classes, viz. :—

1st. Interested persons not actually themselves litigant. The evidence of these was first made generally receivable by Lord Denman's Act.

2ndly. The litigants themselves, who were first made competent and compellable to give evidence by the Act of 1851.

The auxiliary jurisdiction of equity in compelling a discovery was directed to the mitigation of the evils caused by the disqualification of the latter of these two classes—*i.e.*, *the parties litigant*.

These evils, but for the interference of equity, must indeed have been extreme. Thus, a plaintiff at law might sue a defendant notwithstanding the existence of circumstances known only to the parties litigant, but which, if given in evidence, would afford a good defence to the action. Let me put, as a possible case, that of a plaintiff suing for goods sold and delivered, the defendant having personally paid the price to the plaintiff in cash. At common law the defendant was

(a) 14 & 15 Vict. cap. 99.

(b) The exceptions, so far as relates to civil proceedings, have now disappeared. They were abolished, as to husbands and wives (except in proceedings for adultery), by 16 & 17 Vict. cap. 83, and after intermediate enactments (21 & 22 Vict. cap. 108, s. 11 ; and 22 & 23 Vict. cap. 61, s. 6) ; this exception as respects proceedings in adultery was abrogated by the 32 & 33 Vict. cap. 68 ; by which last Act the exception applicable to actions for breach of promise of marriage was also abolished.

remediless. The plaintiff proved the delivery of the goods, and recovered the value. Equity, however, allowed the defendant, under these circumstances, to file a bill against the plaintiff at law, calling upon him to answer upon oath the interrogatories contained in it; and then the plaintiff at law, unless prepared to perjure himself, was obliged by his answer to admit (though it might be with his own colouring) the substantial facts of the case.

This answer, although not evidence in the ordinary sense, might be given in evidence by the other party as an *admission* made by the plaintiff at law, just as any letter written by him admitting relevant facts might have been given in evidence. It was viewed strictly as an admission; so that if the plaintiff in equity wished to give any portion in evidence upon the trial at law, he was obliged to read the whole, and make the whole evidence.

Of course you will understand that a plaintiff at law had just as much right to file a bill for discovery in equity in aid of his action at law, as had a defendant at law against the plaintiff in aid of his defence. And you will bear in mind that, in addition to the cases in which the object of the bill was to obtain an admission of facts exclusively within the knowledge of the parties litigant, there were many others in which the aim was to obtain a discovery and production of documents; an object effected in equity by means of the ordinary interrogatory as to documents and subsequent motion for production (a).

(a) It must be borne in mind, however, that the more searching cha

By these means the shortcomings of the law in respect to evidence were in some measure remedied. I say in some measure, because the admission of a third person being no evidence against a party litigant, the assistance of the court could in no way be made available to supply the exclusion of the evidence of persons falling within the first class. In fact, the *evidence*, in the technical sense of the word, of each class, was excluded equally in equity and at law; and the rule was perfectly settled, that no bill of discovery lay against a mere witness (a).

Here let me remind you, that discovery always formed and still forms part of the procedure of the court of equity, in those cases in which it grants relief in the exercise either of its *exclusive* or of its *concurrent* jurisdiction. The defendant was and is, in those cases, compellable to answer interrogatories which formerly were contained in the body of the bill, and now are delivered separately.

But the discovery granted by the court of equity as the handmaid of the courts of law, was obtainable

racter of the equity procedure in reference to production of documents was not "*per se*" a sufficient ground for a bill of discovery. Thus a bill for discovery would not lie against a mere witness, notwithstanding the inferior efficacy of a *subpœna duces tecum*; *Fenton v. Hughes*, 7 Vesey, 291. A singular statutory exception is to be found in the enactments (6 & 7 W. IV. cap. 76, s. 19; 32 & 33 Vict. cap. 24) authorising bills for the discovery of the names of printers, publishers, and proprietors of newspapers, as to which see *Dixon v. Enoch*, L. R. 13 Eq. 394.

(a) There was a special exception in the case of the secretary or other public officers of a corporation, who might be made co-defendants with the corporation for the purpose of obtaining discovery in the case either of a bill for relief or of a bill for discovery only; *Glascott v. Copper Miners' Company*, 11 Simons, 305.

only on very different terms from that which formed part of the ordinary procedure of the court. For the moment the bill for discovery had been fully answered, the defendant, however strong a case he might have admitted against himself, was entitled to his costs in equity; and the plaintiff in equity, even though ultimately successful, either as plaintiff or as defendant in the action at law, had to bear the entire costs of his bill of discovery. Consequently, except where the amount in dispute was large, a bill of discovery in equity was too costly a weapon for use.

When therefore we consider the onerous terms upon which only the equity courts granted discovery in aid of actions or of defences to actions at law, we cannot but view with satisfaction the statutory jurisdiction lately conferred on the common law tribunals—a jurisdiction which has rendered them practically independent of the auxiliary jurisdiction of equity in affording discovery.

The first step towards enabling the courts of law to do for themselves what equity had previously done for them, was that taken by the Evidence Act of 1851 (*a*), the Act which first made *parties* good witnesses. The sixth section is in these words: “Whenever any
“ action or other legal proceeding shall henceforth be
“ pending in any of the superior courts of common
“ law at Westminster or Dublin, or in the Court of
“ Common Pleas for the County Palatine of Lancaster,

(a) 14 & 15 Vict. cap. 99.

“ or the Court of Pleas for the County of Durham,
“ such court and each of the judges thereof may re-
“ spectively, on application made for such purpose by
“ either of the litigants, compel the opposite party to
“ allow the party making the application to inspect all
“ documents in the custody or under the control of
“ such opposite party relating to such action or other
“ legal proceeding, and if necessary, to take examined
“ copies of the same, or to procure the same to be
“ duly stamped, *in all cases in which previous to the*
“ *passing of this Act, a discovery might have been*
“ *obtained by filing a bill, or by any other proceeding*
“ *in a court of equity at the instance of the party so*
“ making such application as aforesaid to the said
“ court or judge.”

The penman of this enactment would appear to have been but imperfectly acquainted with the equity system of discovery. The section is directed merely to compelling the production and inspection of documents, which constitutes but a portion of discovery in the general sense of the word; indeed the word “discovery” is, in equity, more commonly applied to that discovery which is obtained directly from a defendant’s answer, and not indirectly by production. And yet, in this section, “inspection or production of documents” and “discovery” seem to be viewed as equivalent things.

The absence of any provision in the Act for compelling a discovery generally in answer to interrogatories, is probably to be explained by the circumstance, that the framer of it considered the privilege thereby con-

ferred of calling the opposite party as a witness, to be all that was really needed.

In reference to the jurisdiction to compel inspection thus conferred by the Evidence Act, the common law courts decided shortly after it came into operation, that the party applying for inspection, must make out upon affidavit a *prima facie* case, stating with sufficient distinctness the nature of the documents of which he required inspection (a). The new jurisdiction as thus exercised was obviously far less beneficial to the party requiring discovery than in equity: where, upon an interrogatory calling upon the defendant to the bill of discovery to state what documents he had in his possession, he was compelled, first to answer, and subsequently to produce for inspection all which he admitted to be relevant and which were not specially privileged.

However, by the Common Law Procedure Act of 1854 (b), further and more elaborate provisions for compelling discovery were made.

By the 50th section, upon the application of either party to the action at law, and upon an affidavit by such party of his belief that any document to the production of which he is entitled is in the possession or power of the opposite party, the court or a judge may order the opposite party to answer on affidavit *what documents he has in possession or power relating to the matters in dispute*; and upon such affidavit being made, the court or judge may make such further order

(a) See *Hunt v. Hewitt*, 7 Exchequer R. 236.

(b) 17 & 18 Vict. cap. 125.

thereon as shall be just—*i.e.*, order an inspection or not.

The 51st section confers on either party a power of delivering written interrogatories to the opposite party, provided such party would be liable to be examined as a witness upon such matter; and the party interrogated must answer by affidavit, or, in default, a contempt of court will be deemed to have been committed. And by the 59th section, where the written interrogatories are not sufficiently answered, the court may direct an oral examination before a judge or master of the party interrogated.

In reference to the jurisdiction conferred by this last Act, the following points appear worth noting:—

1. The jurisdiction under the 50th section, in reference to inspection of documents, is more liberal to the party seeking discovery than that under the Act of 1851. For upon a mere affidavit of belief by either party that the other party has some document in respect of which a right of discovery exists, the "onus" is cast upon such party of stating what relevant documents he has, pretty much as in equity. If, however, the rule is to be established that the party applying must in his affidavit describe the documents, that the court may see that they are documents *to the production of which he is entitled* (a), or even specify some one document in order to entitle himself to the aid of the court (b), it is obvious that the com-

(a) See *Thompson v. Robson*, 2 Hurlstone & Norman, 412; adhered to in *Woolley v. Pole*, 14 Common Bench Rep. (N.S.) 538.

(b) See *Hewett v. Webb*, 2 Jurist, N.S. 1189; *Bray v. Finch*, 1 Hurl-

mon law jurisdiction under this section must occasionally fall short of the requirements of the party seeking discovery ; unless, indeed, the practice be introduced of first delivering an interrogatory respecting documents under section 51, and then, after the requisite knowledge respecting documents has thus been gained, applying for inspection under section 50 (a).

2. In regard to discovery upon oath under the 51st section, it will be seen that the right to administer interrogatories is made dependent on the party to be interrogated being liable to be called and examined as a witness upon such matter ; so that at first sight it might seem that the affidavit in answer to the interrogatories was intended to be viewed as *evidence*, and not as an *admission* under the old practice. The intention of the words referred to must, however, I conceive, be held to have been to reserve to the party interrogated the right of objecting to answer any particular interrogatory upon *any point* which as witness he might have declined answering ;—say an interrogatory the answer to which might tend to criminate him, or an interro-

stone & Norman, 468 ; *Evans v. Louis*, L. R. 1 C. P. 656. The practice in the Admiralty Court followed that in Chancery ; *The Minnehaha*, L. R. 3 A. & E. 148.

(a) It is believed this practice was introduced to a considerable extent ; see *Adams v. Lloyd*, 3 Hurlstone & Norman, 351 ; though if the *ratio decidendi* in that case was generally adhered to in the Common Law Courts, the discovery obtainable must have fallen far short of what might have been gained in Equity. According to the Chancery practice the oath of the person interrogated was accepted as conclusive only upon the question whether the documents mentioned by him were all that he had relevant to the matter in question ; but he was bound to schedule or describe all he had, whether privileged from production or not, leaving the Court to decide whether they should, or not, be produced.

gatory calling for the disclosure of a communication made to the party by his wife during the marriage, specially protected by the 16 & 17 Vict. cap. 83 (a). And I am informed that the ordinary practice of the common law courts is to treat the affidavit of the party interrogated as an admission merely which cannot be put in evidence at all on behalf of the party making it, and which, if put in evidence by the interrogating party, must be put in evidence altogether, and the whole of it read.

One question yet remains before parting with the subject of discovery as a head of auxiliary jurisdiction. Have the recent powers conferred on the common law courts theoretically affected the auxiliary jurisdiction of the courts of equity? Practically, I believe a bill of discovery in equity is hardly ever now heard of. But circumstances might occur at the present day to render desirable a resort to equity for discovery; say, for instance, a narrow construction by the common law courts of the powers of compelling inspection of documents. In such a case, if the stake were sufficiently large, a bill of discovery in equity might be desirable.

Upon principle, the jurisdiction must be held to remain. No doubt, under the old law, the equity courts declined to compel a discovery in aid of proceedings in courts having themselves the means of compelling it,

(a) Also, in accordance with the exception made by the 14 & 15 Vict. cap. 99, s. 4, to exclude interrogatories in proceedings instituted in consequence of adultery and in actions for breach of promise of marriage; as to which see now 32 & 33 Vict. cap. 68, abolishing the exception.

such as the ecclesiastical courts (a). But it is a *canon* of equity jurisprudence, that no alteration of the law removing difficulties or impediments which originally led to an assumption of jurisdiction in equity, can operate to deprive the court of a jurisdiction once assumed. Thus, in *Kemp v. Pryor* (b), where it was argued that in consequence of the greater latitude assumed by courts of law in modern times, the bill in that case should have been a bill for discovery merely, and not for discovery and relief, Lord Eldon thus expresses himself:—

“Farther, I cannot admit, that if the subject would
 “have been a subject of equitable demand previously
 “to the extension of the exercise of the principle upon
 “which a court of law is authorised to act in the action
 “for money had and received, that court sustaining an
 “action they would not have sustained forty years ago
 “is an answer to a bill that would have been sustained
 “in this court at that time. Upon what principle can
 “it be said the ancient jurisdiction of this court is
 “destroyed, because courts of law now, very properly
 “perhaps, exercise that jurisdiction which they did not
 “exercise forty years ago? Demands have been fre-
 “quently recovered in equity, which now could be
 “without difficulty recovered at law. * * *

“I cannot hold that the jurisdiction is gone merely
 “because the courts of law have exercised an equitable
 “jurisdiction, more especially in the action for money
 “had and received.”

You will observe, that in the case before Lord Eldon,

(a) See *Dunn v. Coates*, 1 Atkyns' Rep. 288; and an *Anonymous Case*, 2 Vesey senior, 451.

(b) 7 Vesey, 237.

the discussion was respecting instances in which the court had been in the habit of affording *relief* in consequence of the inadequacy of the common law jurisdiction. The same principle must, however, it is conceived, apply to the *auxiliary jurisdiction* of the court in affording *discovery*. The following dilemma seems, however, inevitable—Either the common law jurisdiction in affording discovery will prove equally efficacious with that in equity, in which event a common law litigant will certainly not come into equity for discovery at his own expense; or it will prove less so, and no ground can be alleged in that event for the equity courts ceasing to exercise their ancient jurisdiction (a).

We proceed now to the *second* subdivision of the *first* class, viz., Perpetuation of Testimony.

It happens occasionally that a person entitled presumptively to some future interest in property, finds his title impeached or threatened by some other person interested in disputing it; and yet, in consequence of the future or reversionary nature of that title, the law affords him no means of asserting and establishing it. Meanwhile the very testimony upon which his title depends may be in danger of perishing by the death of those who, if alive, would be able to give evidence in its support. In this state of things, it is competent to

(a) The observations of Lord Hatherley (when V.-C. Wood), in the case of the British Empire Shipping Company v. *Somes*, 3 Kay & Johnson, 437, fully supporting the jurisdiction, had escaped me, when writing the above. Subsequently, the precise point discussed in the text arose upon demurrer to a bill for discovery in aid of proceedings in ejectment, and the demurrer was overruled, and the old jurisdiction upheld, by the late V.-C. Wickens; *Brown v. Wales*, L. R. 15 Eq. 142.

the party claiming such future interest to file a bill in equity against all those who are interested in disputing it, asking that witnesses may be examined respecting the point in controversy, and that the testimony may thus be perpetuated (a). Perhaps the best instance that could be given of a suit of this class, is the case of *Dursley v. Fitzhardinge Berkeley* (b). It arose out of the circumstances which at a later date gave rise to the well-known *Berkeley Peerage Case* (c) in the House of Lords.

The plaintiffs were four infant sons of the then Earl Berkeley, the first plaintiff on the record (there called Lord Dursley, and then about fifteen) being the same person who in later life was well known, first as Colonel Berkeley, and subsequently as Lord Fitzhardinge.

The defendants were two other infant sons of Earl Berkeley, and also Admiral Berkeley, a brother of the then Earl, and the son of the Admiral. The bill stated that certain estates stood limited to the Earl for life, with remainder to his first and other sons in tail male, with remainder to Admiral Berkeley for life, with remainder to his first and other sons in tail male, and stated in detail the question respecting which perpetuation of testimony was sought, viz., an alleged marriage between the Earl and his countess in 1785. There

(a) It would seem that originally the practice was to file a bill against the witnesses themselves. See *Earl of Oxford v. Sir James Tyrell and Others*, *Calendars of Proceedings in Chancery*, vol. i. p. cxx.

(b) 6 Vesey, 251.

(c) The case is, I believe, not reported, but the Minutes of the Evidence taken in 1799 and 1811 will be found amongst the House of Lords' printed papers.

had been a subsequent marriage in 1796. The four plaintiffs were all born before this subsequent marriage—their two infant defendant brothers after it. The legitimacy of the latter was undoubted, whichever marriage prevailed. The legitimacy of the plaintiffs depended upon the fact of the solemnization of the alleged prior marriage. Now you will observe that the then Earl of Berkeley was actually tenant for life in possession, so that no means existed of litigating the question of legitimacy (*a*); and under these circumstances the infant plaintiffs prayed that the evidence of the alleged marriage of 1785 might be perpetuated.

The particular point decided in the case was that the infant plaintiffs were entitled to perpetuate testimony against Admiral Berkeley and his son, notwithstanding the *remote position of the latter in the order of entail*; but the judgments of Lord Eldon (he delivered two) are replete with valuable information, and will be found to contain the leading doctrines of the court in reference to the head of equity now under consideration. These, at the date of Lord Eldon's judgment (for they have been somewhat modified by a statute to which I shall presently advert), may be shortly thus stated.

First—Any interest, however small and remote, and though contingent only, is sufficient to sustain a bill for perpetuating testimony. This was the point upon which Lord Eldon's decision turned. He argued thence that, *à fortiori*, Admiral Berkeley and his infant son,

(*a*) See now "The Legitimacy Declaration Act, 1858" (21 & 22 Vict. cap. 93.)

though only remote remainder men, might, as having *vested* remainders, have sustained a bill against the infant plaintiffs to perpetuate testimony of their *illegitimacy*, and that therefore the plaintiffs were, *e converso*, entitled to file a bill against them.

Secondly.—The court declines to perpetuate testimony of a right which might be immediately barred by the defendant against whom perpetuation is sought, as in the case of a remainder man filing a bill against tenant in tail in possession.

Thirdly.—A mere expectancy, or *spes successionis*, was not considered sufficient to sustain a bill (a).

Thus, the heir at law or next of kin for the time being were not entitled to file a bill to perpetuate evidence of their heirship or relationship. Referring to the case of a lunatic, Lord Eldon says: “Put the case as high as possible, that the lunatic is *intestate*; “that he is in the most *hopeless state*; a moral and “physical impossibility, though the law would not so “regard it, that he should ever recover, even if he “was *in articulo mortis*, and the bill was filed at that “instant, the plaintiff could not qualify himself as “having an interest in the subject of the suit.” We shall see presently the effect of the late statute upon this point.

Fourthly.—A bill to perpetuate testimony only applied where some right to property was involved. This (which I may observe, you will not find laid down in the case before Lord Eldon) was admitted in the

(a) See *Smith v. Attorney-General*, Romilly's Notes of Cases, 54.

Townshend Peerage Case (a), which I am about to mention.

This case (that of the Townshend Peerage) was not only remarkable in its circumstances, but important as having led to a statutory extension of the law with regard to the perpetuation of testimony. It came before Committees of Privileges of the House of Lords twice ; viz., in 1842 and 1843. The facts were shortly these.

The late Marquis Townshend (when Lord Chartley) in 1807 intermarried with one Miss — ; who in 1808 left him, and instituted a suit against him for nullity of marriage, alleging his impotency. Dropping that suit, she eloped in 1809 from her father's house with a Mr. —, and went through a ceremony of marriage with him at Gretna Green. During many years' cohabitation with him, several children were born, who at first were named after him, and educated as his children; but, in 1823, they and their mother assumed the names and title of the peer. The Marquis generally lived abroad, had no access to his wife, knew of her infidelity, but took no proceedings to dissolve the marriage or bastardize the children. In 1841, the eldest of the children, then of full age and calling himself "*Earl of Leicester*," was elected for the borough of Bodmin, and returned in the writ as "the Honourable John Townshend, commonly called the Earl of Leicester," and he declared his qualification to sit in the House of Commons to be as eldest son of a peer of the realm.

(a) 10 Clark & Fennelly, 289.

Under these circumstances a petition was, in 1842, presented to the House, by the next brother of the Marquis Townshend, setting forth in considerable detail the facts just stated, stating that he was advised he had no means of disputing the legitimacy of the person so calling himself Earl of Leicester, and praying that their lordships would provide such remedy and adopt such proceedings as to their lordships might seem meet (a).

The result of this petition was the introduction by

(a) The petition concluded thus :—

“ That some of the witnesses by whom only many of the most important facts can be proved, are far advanced in life, and in uncertain health ; and other persons whose testimony is material, refuse to make any disclosures unless compelled by a court of justice ; but if any of these persons should happen to die in the lifetime of the Marquis, it may be impossible to prevent an individual, notoriously begotten and born in adultery, from succeeding to the numerous honours of the petitioner’s family. That in consequence of there not being any property involved in the succession of the petitioner as heir to his said brother, he is advised that he cannot file a bill in Chancery to perpetuate testimony ; and he submits that it would be not merely an anomaly, but an injustice to the families of peers, if, while the law provides means for securing the rights of inheritance of the humblest person in the kingdom to every kind of property, by enabling the party interested to perpetuate the evidence of witnesses in case of their death, no such means should exist with respect to the highest and most important right of inheritance, the dignity of a peer of the realm. That the petitioner, naturally anxious to secure to himself and his family the enjoyment of his and their legal rights, and to prevent the same from being lost by the success of an imposition so audacious as to be absolutely without precedent, nevertheless feels that your lordships have at least an equal interest in the question. The petitioner therefore humbly submits the difficulties under which he labours, and the injustice which may arise, as well to their lordships and the peerage as to himself and his family, to the consideration of their lordships, and prays that your lordships will provide such remedy and adopt such proceedings as to your lordships may seem meet.”

Lord Cottenham into Parliament of a bill, which subsequently became law, as the Act of the 5 & 6 Vict. cap. 69.

By this Act (after a preamble reciting that it was expedient to extend the means of perpetuating testimony in certain cases), it was by the first section enacted in substance, that any person who would, under the circumstances alleged by him to exist, become entitled upon the happening of any future event to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled, from and after the passing of that Act, to file a bill in the High Court of Chancery to perpetuate any testimony which might be material for establishing such claim or right.

The second section provided for making the Attorney-General a defendant to all suits instituted under the authority of the Act, touching any honour, title, or dignity, or any other matter in which the Crown might be interested.

The chief extensions made by this Act were shortly as follows:—

First.—The right to perpetuate testimony was extended to persons claiming titles, dignities, or offices, and not restrained as before to claims in respect of property.

Secondly.—A person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, &c. &c., may now

file a bill to perpetuate, so that the distinction adverted to as existing in Lord Eldon's time between a mere *spes successionis* and a remote interest no longer exists; and an heir at law or next of kin may equally have testimony perpetuated.

In reference to the particular case (the Townshend Peerage) which gave rise to the Act, it is sufficient to state, that in the subsequent session, that of 1843, both the Marquis Townshend himself, and his brother the former petitioner, applied to the House, claiming its interference, notwithstanding the altered state of law under the new Act; and in the same session, under the auspices of Lord Brougham, a private Act was passed (a) enacting that the children of the Marchioness, therein mentioned, with the exception of one child, a minor, whose rights were specially saved, were not, nor should any of them be deemed, lawful issue of the Marquis. Thus, singularly enough, the particular case, to meet which the general Act was passed, never needed the assistance of it.

A few points in reference to the practice of the court in suits of this kind demand notice.

1. The depositions taken are never published until, by reason of the death of the witness, it becomes apparent that his testimony cannot, when litigation shall arise, be given in the ordinary way.

This circumstance you will frequently find commented upon in the cases, as a marked infirmity in the

(a) An elaborate protest against the passing of the Private Act was signed by Lord Cottenham and six other peers; see 10 Clark & Finnelly, 314.

jurisdiction itself (a). The witness, it has been observed, gives his testimony without being under the restraint of any of those penalties which the law imposes upon perjury; for during his life the evidence is not published, and after his death human tribunals can no longer reach him. The evil was, under the old practice, aggravated by the circumstance that cross-examination was a mere shadow, the interrogatories for cross-examination (so-called) being framed without any knowledge of what the witnesses might say on their examination in chief. But it has been decided that the alterations in equity procedure introduced in 1852 in reference to taking evidence, apply to the case of examining witnesses *de bene esse* (b); and upon principle, therefore, witnesses in a suit to perpetuate testimony must either be examined *vivâ voce* before an examiner, the other side attending and giving evidence, or they must depose by affidavit, and there will then be the right of cross-examining upon the affidavit.

2. Bills to perpetuate testimony are never brought to a hearing (c); in truth, there is nothing to hear; for first, there is no issue immediately triable, and secondly, the evidence not being published, there is no evidence available. The practice is as follows: If the defendant merely cross-examines the witnesses of the plaintiff, he is entitled to his costs. If he examines

(a) *Angell v. Angell*, 1 Simons & Stuart, 83, p. 89.

(b) *Cook v. Hall*, 9 Hare, App. xx.

(c) And a motion to dismiss a bill of this kind for want of prosecution was irregular. The proper application was that the plaintiff do proceed within a given time, or pay the defendant his costs; *Wright v. Tatham*, 2 Simons, 459. See further, *Ellice v. Roupell* (No. 2); 32 Beavan, 315.

witnesses of his own, then, as he has availed himself of the bill to perpetuate testimony in his own favour, he must bear his own costs (a).

The *third* subdivision of my first main division of auxiliary jurisdiction, namely, bills for the examination of witnesses "de bene esse," may be treated as practically defunct.

In former times, a plaintiff, who had actually commenced litigation at law, or a defendant who was actually sued there, might be under the apprehension *either* that at the time of trial important witnesses actually abroad might still be there, *or* that important witnesses of advanced years might be then dead, *or* that old or infirm witnesses might be then unable to travel. Justice required that under these circumstances the evidence of these witnesses should by some mode be taken and preserved, so as to provide against the event of its not being obtainable in the regular way at the trial.

Formerly the common law courts possessed no machinery for accomplishing this important object; and under these circumstances bills used to be filed in equity, praying a commission for the examination of witnesses. These bills resembled obviously, in their nature, bills to perpetuate testimony. But there were certain technical distinctions. Thus the bill to obtain a commission for the examination of witnesses abroad, or of aged or infirm witnesses, lay only where litigation had actually commenced (b). And there were distinc-

(a) *Vaughan v. Fitzgerald*, 1 Schoales & Lefroy, 816.

(b) *Angell v. Angell*, 1 Simons & Stuart, 83. On the other hand, it

tions in reference to the circumstances under which publication of the evidence was permitted (a).

But there would be little advantage in dwelling upon the peculiarities of a jurisdiction now practically obsolete.

The first effort to free the common law courts from the need of the assisting hand of Equity, was that made by the India Bill of 1773 (b), which provided for taking evidence in India in reference to actions and suits of which cause arose in India. In 1830 (c), power was given to the common law courts, to order an examination upon interrogatories or otherwise, of any witnesses within the jurisdiction, and to issue commissions for the examination of witnesses out of the jurisdiction; and from this Act we may date the practical extinction of the head of *auxiliary jurisdiction*, which, in consequence, we have merely glanced at.

Secondly.—We pass now from the class of cases in which the aid of equity was afforded to supply the infirmity of the common law in respect of evidence, to that where a jurisdiction was exercised to repress needless and vexatious litigation at law, as in Bills of Peace; or to provide for a fair and sufficient trial in

was a fatal objection to a bill for perpetuation of testimony, if taken at the proper time, that the matters in dispute might be made the subject of immediate judicial investigation; *Ellice v. Roupell* (No. 1), 32 Beavan, 299; *Earl Spencer v. Peek*, L. R. 3 Eq. 415. And see further, as to the distinction between “perpetuating testimony” and “examination *de bene esse*,” the judgment of the late Master of the Rolls in *Ellice v. Roupell* (No. 2), 32 Beavan, 308.

(a) *Harris v. Cotterell*, 3 Merivale, 680.

(b) 13 Geo. III. cap. 63, s. 44.

(c) By 1 Will. IV. cap. 22, s. 1.

the proper *forum*, as in the case of bills to establish wills.

Here the jurisdiction, though "auxiliary," in the sense that the equity court did not altogether supersede the common law jurisdiction, was exercised upon very different principles from those regulating the auxiliary jurisdiction in cases of the first class.

In cases of the first class the jurisdiction may be accurately termed "*ancillary*." In those of the second, equity no longer appears as the *handmaid*, but is found superintending and regulating the legal proceedings, guiding them in fact to a just and fair result.

To consider, first, "Bills of Peace."

It occasionally happens that many persons, possessing or supposing themselves to possess some common right, find that right disputed by some other person who is in a position, if so inclined, to litigate separately at law with each of his opponents their title to the common right alleged.

Take, as an instance, the case of a manor, with several copyholders, and of a dispute arising as to the amount of the fine payable to the lord by the copyhold tenants. Here the lord might, if he chose, litigate separately with each tenant the question respecting the fine to be paid. After failure in a trial with one, he might discover new evidence, and try whether, with his additional evidence, and possibly a more favourable jury, he might not be more successful against another copyholder. And this might be repeated *ad libitum*. The only check would be, the increased probability of defeat after every new failure, and the correspondingly

increasing probability of having to pay costs. On the other hand, the vexation might proceed from the tenants, who might *seriatim* and in detail harass the lord after repeated failures on their part.

In a case of this kind, equity supplies a remedy by what is called a *Bill of Peace*. Either the successful tenants may file their bill against their litigious lord, or the successful lord against his litigious tenants, claiming to have the right ascertained and quieted.

In reference to this jurisdiction, the case of the *Mayor of York v. Pilkington* (a) is especially instructive as being only just within the boundary-line which separates cases fitted for a Bill of Peace from those which are not. In fact, you will find Lord Hardwicke was at first of opinion that the bill would not lie in the particular case, and subsequently that it would.

The bill was filed by the corporation of York, claiming a sole right of fishery over a large tract of the river Ouse, against the defendants, who claimed several rights either as lords of manors, or occupiers of the adjacent lands. Lord Hardwicke at first thought that there was not a sufficient community of right between the defendants to make the case suitable for a bill of peace, the defendants not all claiming or defending in the same character, as where you have tenants of a manor on the one side and lord on the other; parishioners, in the old tithe suits, on the one side,

(a) 1 Atkyns, 282.

and parson on the other. And upon this ground he, in the first instance, allowed a demurrer to the bill. Subsequently the demurrer was set down to be re-argued, and his Lordship held that the existence of one general right claimed by the plaintiffs was sufficient to sustain the bill, although the defendants might make distinct defences; and the demurrer was ultimately overruled (a).

It may be observed that bills of peace have, of late years, become exceedingly rare; though previously to the Statutes for the Commutation of Tithes, this class of bill occurred frequently in the shape of a suit, either by a parson to establish his right to tithes, or by parishioners to establish a *modus*. Occasions may, however, even at the present day, occur, when a bill of peace would be a fitting step. You will find in "Van Heythusen's Equity Precedents" (b) a form of a bill, the object of which was to obtain the benefit of former decrees, fixing all the inhabitants of a particular district with a liability to grind their corn at a particular mill.

But, besides the cases which we have just been considering, where the opportunity for vexatious litigation arises out of the number of claimants on one side,

(a) In a case, where a person claiming to be the owner of a patent had filed 134 bills against different defendants, Lord Westbury, L. C., directed the validity of the patent to be tried as against three selected defendants, representing different classes of alleged infringers, thus virtually giving the defendants the benefit of a bill of peace against the alleged patent owner; *Foxwell v. Webster*, 10 Jurist (N.S.), 137; 4 De Gex, Jones, & Smith, 77.

(b) Vol. i. p. 611; see the decrees at pp. 614, 622.

there is another in which, although the parties litigant be merely A on the one hand and B on the other, trial after trial may be had, subject only to the check imposed by the fear of having to pay costs. I allude to proceedings in ejectment.

The action of ejectment was, if you recollect, originally a convenient invention for trying the title to land without the formality of a real action. Thus Jones claimed the freehold against Thompson, the latter being in possession. The following fiction was supposed:—

Jones, the claimant, was treated as having entered upon the land, and as having, after entry, made a lease to Doe. Next, it was supposed, that while Doe was on the land, claiming under the lease; Roe, claiming title under Thompson, the person really in possession, had come and turned Doe out. Roe was called the casual ejector.

To seek redress for this imaginary wrong, an action was commenced in the name of Doe against Roe. Doe, on the demise of Jones—the real claimant—against Roe (*a*), was the title of the action. Notice of this action was given to Thompson, who was let in to defend on the terms of his admitting all the fictitious suppositions, viz., that Jones had leased to Doe, that Doe had entered, and that Roe had turned Doe out. To use the ordinary phraseology, the real defendant, Thompson, had to confess, lease, entry, and ouster. In its subsequent stages, the suit proceeded so as to try the real point between Jones and Thompson; and

(a) Doe *dem.* Jones *v.* Roe.

ultimately there was a verdict for or against Doe, as the case might be.

Now, although generally the courts of law moulded this fictitious action so as to work effectual justice, we find here and there curious anomalies flowing from the fiction which it involved. Thus, for instance, although the sovereign cannot, as you know, sue or be sued in his own court, yet he might maintain an ejectment—for the ejectment would be brought in the name of Doe, or Goodtitle, as lessee; and the lessee of the sovereign must needs have his remedy as well as other lessees. Accordingly, in the thirteenth volume of Meeson and Welsby's Reports, you will find a case of Doe *dem.* William IV. *v.* Roberts. Again—and it is with this anomaly we are here concerned, since the plaintiff was Doe, Goodtitle, or some other imaginary person—if one ejectment failed, another might be brought immediately after, and a third and fourth, and so on, *ad infinitum*. For the new plaintiff was not, in legal contemplation, the same person as the one who had failed in the former action. Any name might be selected for the imaginary plaintiff. The only check at law upon repeated and vexatious ejectments was the practice adopted by the common law courts of staying summarily a fresh ejectment until the costs in the former action had been paid; a restraint obviously inadequate to meet the real justice of the case. Under these circumstances, the equity courts, in cases of repeated and vexatious ejectments, when the right had been sufficiently tried, took upon themselves to interfere and stay further litigation.

This branch of jurisdiction cannot be said to have been finally settled until the case of the *Earl of Bath v. Sherwin* (a), which is a leading case on the subject.

There the plaintiff's title had been established in five successive ejectments, and he brought his bill for a perpetual injunction, and to stay the defendant bringing any more ejectments, and to put his title in peace.

Lord Cowper, on the original hearing before him, after observing in his judgment upon the jurisdiction assumed by the court in cases arising between lords of manors and tenants, said :—

“ If in case the right between the lord and the several
 “ tenants was to be settled in separate actions, the diffi-
 “ culty upon the lord would be insuperable, by reason
 “ of the multiplicity of suits at law; the like in settling
 “ boundaries, &c.: therefore this court will interpose
 “ and direct an issue to be tried; and the conscience
 “ of the court thereby informed and satisfied, this court
 “ will then put the whole in peace by a perpetual
 “ injunction.

“ But this case,” he said, “ was in its nature new,
 “ and did not fall under the general notion of a bill of
 “ peace, this being only between A and B, and one man
 “ is able to contend against another; and if the courts
 “ of law on new demises will not suffer the former
 “ verdicts to be pleaded, he could not help it: he said
 “ he was satisfied of the vexatiousness of the defendant
 “ in this case: but if it was a grievance, it was in the

(a) Precedents in Chancery, 261.

“ law, which was proper for another jurisdiction, viz.,
 “ the parliament, to reform ; and that it would be
 “ arrogance in him by decrees or injunctions to take
 “ upon him the reformation of the law.”

However, the House of Lords, upon appeal from Lord Cowper's decision, took a different view, and granted an injunction (a).

Now, with reference to bills of this last class, the Common Law Procedure Act of 1852 (b), though consigning Doe and Roe to the grave, has retained the anomaly derived from their former existence : I mean the non-conclusiveness of the action of ejectment ; the 207th section of the Act expressly providing, “ That
 “ the effect of a judgment in an action of ejectment
 “ under that Act should be the same as that of a judgment in the action of ejectment theretofore used.”
 The Procedure Act of 1854 (c) has somewhat improved the position of persons harassed by repeated ejectments, the 93rd section enacting that a person bringing a second ejectment after a prior unsuccessful one, may be ordered to give security for costs. But subject to these restrictions the right to bring repeated actions still exists, and the auxiliary jurisdiction of equity to quiet titles against vexatious ejectments must therefore be regarded as still needful and in force (d).

(a) 4 Brown's Parliamentary Cases, 373.

(b) 15 & 16 Vict. cap. 76.

(c) 17 & 18 Vict. cap. 125.

(d) It is conceived that the 207th section of the Act of 1852 would not now apply to judgment obtained under the existing practice in an “ Action for the Recovery of Land,” and that the jurisdiction referred to is no longer needed. And although formerly a defence in equity could be made available only by bill, as there could be no equitable plea in an

Of the heads of auxiliary jurisdiction mentioned by me at the outset, "Bills to Establish Wills" alone remain.

There is, perhaps, hardly any portion of our judicial machinery which affords less ground for satisfaction than that which has been provided, or rather suffered to exist, for the litigation of matters testamentary.

Let us first consider the state of the law as it stood previously to the Act of last session (b).

When, upon the death of a person, a document is produced purporting to be his will, two questions obviously arise. First, is the document really and legally his will?—that is, was it really executed by him when of sound understanding, and with full knowledge of its contents?—and is it executed and attested in the manner required by law? Secondly, what is the meaning of the document itself? We have the question of "Factum," and the question of "Construction."

Now, in reference to both these questions, the jurisdiction was altogether until the late Act (c), and indeed still remains to a considerable extent, different accord-

action of ejectment, *Neave v. Avery*, 16 Common Bench Reports, 328; now, under the Rules of the Supreme Court regulating "Actions for the Recovery of Land," a defendant who is in possession need not plead his title *unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff*—in which excepted cases he must plead his defence. See Order xix. rule 15.

(a) *i.e.*, 20 & 21 Vict. cap. 77, passed in the session previous to the delivery of the Lectures.

(b) 20 & 21 Vict. cap. 77.

ing as the property affected by the will was or is real or personal estate.

We will take *Personal Estate* first.

In the earliest ages of our legal history, if a man died intestate, the bishop or ordinary used to take possession, either of the whole or of the disposable portion, as the case might be, of his personal estate; and apply the same for the spiritual benefit of the soul of the departed, and the temporal advantage of Holy Church (a). Hence, where a deceased person had made a will, it was natural that it should be produced to the "ordinary," that he might be satisfied on that point; and this no doubt was the source of the testamentary jurisdiction of the ecclesiastical courts, which thus became, and until the late Act continued to be, the proper tribunals for determining the *factum* of the

(a) The charter of King John of 1215 contained a clause intended to remedy this abuse, and expressed as follows:—"Si aliquis liber homo intestatus decesserit bona sua per manus proximorum parentum suorum et amicorum et per visum ecclesie distribuentur, salvo unicuique debitum quod defunctus ei debebat." In the re-issue of the charter by Henry III. after the death of John this provision and many others, such as those relating to scutages and aids, debts to the Jews, &c., are not contained.

The charter of Henry III. contains a respiting clause which, after referring to various omissions, reserves them for further consideration; but the distribution of the goods of intestates is not amongst the matters mentioned to have been omitted, and was doubtless advisedly not so mentioned, the non-mention being probably part of the price of the concurrence of Gwalo, the Papal Legate, whose name appears at the head of those by whose counsel the charter of Henry III. was issued. The provision does not appear in the subsequent charters of Henry, which have no respiting clause.

If the foregoing abortive attempt be laid out of account, the statute of the 13th Edward I. stat. i. cap. 19, first compelled the ordinary to pay the deceased's debts. The 31st Edward III. cap. 11, first took the administration from the ordinary, and gave it to the next of kin.

will, so far as related to the *personal estate* affected thereby.

Next, as to *construction*. The Ecclesiastical Court had no power to put a construction on the will, except so far as might be necessary for determining to whom probate, or administration with the will annexed, should be granted. The function of construing wills, so far as related to *personal estate*, devolved on the equity courts, and still remains with them as part of their jurisdiction in reference to the administration of the estates of testators and intestates; a head of exclusive jurisdiction which was touched upon in my fourth lecture.

Secondly.—As to *Real Estate*. Here, subject only to the qualified interposition of the equity courts, which will be presently explained, the common law court, and the jury, each acting within its fitting province, were alone the judges both of *factum* and *construction*. The question of will or no will was tried before a jury at Nisi Prius. Questions of construction were decided by the court in Banc. With the question of *factum*, the Ecclesiastical Court had here no concern. No investigation in that court, however elaborate in reference to the *factum* of the will, could in the slightest degree govern or affect the rights of those claiming the real estate of the deceased, either under or against his will.

The anomaly of the double jurisdiction was less glaring before the Wills Act of 1837 (a), because the Statute of Frauds (b) had imposed special formalities

(a) 1 Vict. cap. 26.

(b) 29 Car. II. cap. 3, s. 5.

of execution and attestation in regard to wills of real estate, while none such were required in reference to wills of personalty. Yet even then, after a protracted litigation in the Prerogative Court, and before the court of delegates, upon the question whether a testator was of sound mind, and after a decree actually pronounced deciding him not to be so, and recalling probate on that ground, it was open to a devisee claiming under the same instrument to contend that the deceased was of sound mind, and the will a good will. I have myself known a learned conveyancer hesitate to accept a title of real estate derived under an heir, though his ancestor's will had been set aside in the Ecclesiastical Court, after twenty-five years of celebrated litigation.

But when Lord Langdale's Act had subjected wills, both of personal and real estate, to the same forms of execution and attestation, the divided jurisdiction shocked common sense more strongly. That first a learned judge of the Prerogative Court, and afterwards, on appeal, the Judicial Committee of the Privy Council, should solemnly determine a will to be well executed and attested so as to bind personal estate; and that the whole matter should be open to new litigation in the common law courts as respected realty, seemed an outrage on administrative justice.

Such, previously to the recent Act (a), was the state of testamentary jurisdiction; and it will be more convenient if, before adverting to the Act itself, we point

(a) *i.e.*, 20 & 21 Vict. cap. 77.

out the nature of the Chancery jurisdiction, in regard to "establishing wills,"—the head of auxiliary equity under consideration.

Under the state of law which we have above slightly sketched out, a devisee of real estate had, apart from the interposition of equity now to be explained, no power to take active steps to establish the validity of the will under which he claimed. Until the heir chose to dispute the will, he (the devisee) could only remain passive. The heir might lie by until the evidence in favour of the will was partially lost by death or otherwise. There was no court to which the devisee could go like the executor or residuary legatee, and say, "decide upon the factum of this will."

Under these circumstances, Chancery lent its aid; and the devisee might obtain its assistance in two different ways.

First.—He might file a bill against the heir in the nature of a bill for perpetuating the evidence of the testator's soundness of mind, and of his execution of the will;—a kind of bill which, in technical language, was commonly called a bill to prove the will per testes. The witnesses to the will were examined as to the testator's sanity, and the fact of execution; and the cause, like other causes for the perpetuation of testimony, was never brought to a hearing; though, *unlike* ordinary causes of this description, the witnesses' depositions were published at once (*a*). This

(*a*) This was expressly so stated by Graham, B., in the case of *Harris v.*

process was commonly called proving a will in Chancery.

Secondly.—The devisee might file a bill against the heir seeking to have the will established, *i.e.*, unless the heir waived an issue, to have the validity of the will tried before a common law jury upon an issue of “*Devisavit vel non.*” In this case the Court of Equity retained the bill until the question of its validity had been determined in an issue, reserving to itself the power, if it thought expedient, of directing a second or even a third trial of the issue; and finally by its own decree established the validity or invalidity either of the will generally, or of any particular devise, and thus quieted further litigation.

You will hear with some surprise, however, that it was reserved for these recent times to ascertain and determine the precise nature of the jurisdiction of the Court of Chancery in reference to “*Bills to Establish Wills.*” It is only four years since, that in the case of Boyse v. Rossborough (*a*), Vice-Chancellor Wood, after reviewing in the most elaborate manner the whole history of this branch of jurisdiction, decided that a bill of this species could be maintained by a devisee

Cotterell, 3 Merivale, 680, where the practice as to publication was carefully considered. Vice-Chancellor Wood, in his elaborate judgment in *Boyse v. Rossborough*, Kay, 71 (see p. 102), seems to have considered there was no difference between the practice as to publication of depositions in this class of bill, and that which was observed in reference to ordinary bills to perpetuate testimony.

(*a*) Kay, 71; on appeal, 3 De Gex, Macn. & Gor. 817. There was an appeal to the House of Lords, but the judgment of the Court of Appeal was submitted to without argument, 3 Jurist (N.S.), 373.

of the legal estate against the heir, although the latter had brought no ejectment. It was argued strenuously that some circumstance, either of trust or of disturbance by the heir was necessary to support such a bill; but the Vice-Chancellor decided that, both upon principle and authority, there was an inherent equity on the part of the devisee, whether legal or equitable, arising from the mere fact of the devise, to have the will established against the heir (a). You will find in the Vice-Chancellor's judgment such a complete review of the whole question, that I am the less concerned at the meagreness of my statements here.

Let us now consider the effect of the Act of last session (b), which has just come into operation. By that Act a new court, called the Court of Probate, is established, to which all the old testamentary jurisdiction of the Ecclesiastical Courts is transferred.

In reference to real estate, the material sections are the sixty-first and the sixty-second. The former of these provides in substance that where proceedings are taken to prove a will in solemn form, or to revoke a probate already granted, all persons interested in the

(a) And a devisee was equally entitled to have the will under which he claimed established in equity, not only against the heir, but against all persons setting up adverse rights; as, for instance, persons claiming under a prior will, and disputing the validity of the latter one; *Lovett v. Lovett*, 3 Kay & Johnson, 1. But the heir had no correlative right to file a bill in Chancery against a devisee to set aside a will on the ground of fraud; *Jones v. Gregory*, 33 Law Journal (N.S.), Chanc. 679; s. c. 4 Giffard, 468; 2 De Gex, Jones, & Smith, 83.

(b) 20 & 21 Vict. cap. 77.

real estate affected by the will, such as heirs, devisees, &c., shall be cited (a). The latter provides that where the will is proved in solemn form, or its validity otherwise established in the Court of Probate, and when probate is refused or revoked, or the invalidity of the will is otherwise declared, the decree of the court shall be binding on the persons interested in the real estate (b).

Under these sections, therefore, when the factum of a will has been once solemnly determined in the Court of Probate, it will be determined finally as respects real as well as personal estate. It is to be observed, however, that it by no means follows that all questions respecting the factum of testamentary instruments will, as respects real estate, be in future determined in the Court of Probate. Cases may yet occur where a will may be proved in common form in the Court of Probate; and the heir alone being interested in disputing its validity, the validity may be first questioned in an action of ejectment (c).

(a) See *Lister v. Smith*, 3 Swabey & Tristram, 53. The 35th section confers on an heir-at-law an absolute right to demand a jury.

(b) The 63rd section renders it unnecessary to cite any heir or other person interested where there is no real estate, or where the will would not, though established, affect real estate. And the decree of the Court is in no case to affect heirs or other persons, unless cited or deriving title under or through a person cited.

(c) Thus, for instance, a testator dies, having by his will, the validity of which is doubtful, devised his real and personal estate (the former of which descended to him *ex parte paternâ*), upon trust to sell and convert and pay the net proceeds, in unequal shares, amongst his half-brothers and sisters *ex parte maternâ*, who are his next of kin. Here assuming the real estate to be large in proportion to the personal estate, it may be

We may, indeed, have the following events occurring :—

First.—Probate in common form.

Secondly.—Litigation in ejectment, calling in question the testator's sanity, or the genuineness or valid execution of the alleged will.

Thirdly.—The question of sanity, genuineness, or validity of execution, litigated a second time in the Court of Probate.

For although after the heir has been cited in the latter Court the decision there will bind him elsewhere, the decision of the common law court, as between the heir and person claiming as devisee, can have no effect in the Probate Court as between those claiming the personal estate under the will and the next of kin (a).

The prospect of a different *final* result, in respect to the operation of a will upon realty and personalty, is no doubt somewhat remote ; the appellate jurisdiction, in reference to wills of personal estate, having

the interest of all the next of kin, including those who take the smaller shares, to support the will ; which therefore may very likely be proved in common form. Then upon the heir *ex parte paternā* litigating the validity of the will as to real estate in the common law court, and succeeding, it will become the interest of those of the next of kin who take the smaller shares to set aside the will as to the personal estate ; and this, if resisted by the other next of kin, may lead to a second litigation in the Probate Court. Again, at first, the personal estate may be thought trifling, and after litigation at law valuable personalty may be discovered.

(a) Nor can the solemn decision of the Probate Court affect a devisee who may happen not to have been cited ; e.g., a remainder-man not *in esse* at the time of the litigation in that Court, and therefore not cited.

by the late Act (a) been transferred from the Judicial Committee of the Privy Council to the House of Lords; to which latter therefore the ultimate appeal now lies, in respect to wills of both species of property. Considerations of expense might, however, where the property is small, preclude an ultimate resort to the House either from one or from both of the subordinate tribunals respectively entitled to adjudicate, and thus leave conflicting decisions on record; and, on the whole, it cannot be said that the Act has done more than mitigate the inconveniences of the double jurisdiction (b).

As respects the head of equity now under consideration, "*Establishing Wills*," that must, to a great extent, still prevail.

When the will has been merely proved in common form, the devisee will have no power under the Act of provoking the exercise of the contentious jurisdiction of the Court of Probate, and he will remain in the same position as he was under the old state of law. If harassed by the heir, a bill to establish the will will obviously be his simplest course; if in quiet possession, but wishing to establish his title while the

(a) 20 & 21 Vict. cap. 77, s. 39.

(b) The difference of views between the Court of Probate (see *Smith v. Tebbitt*, L. R. 1 P. & D. 398) and the Court of Queen's Bench (see *Banks v. Goodfellow*, L. R. 5 Q. B. 549) upon the question "whether partial "unsoundness of mind, not affecting the general faculties, and not "operating on the mind of a testator in regard to the particular testamentary disposition, is sufficient to deprive a person of the power of disposing "of his property," affords an illustration of the inconvenience adverted to in the text.

evidence is at hand, he must still, unless he can, through the friendly assistance of some next of kin, bring about a contentious litigation in the Court of Probate, resort to the Court of Chancery as heretofore.

LECTURE VII.

MY selection of the wife's separate estate for consideration as a particular instance of the exclusive jurisdiction of the Court of Chancery is easily justified. In fact, I may well be allowed a preference in favour of what has worked for good; and seldom has the creative, nay, almost legislative jurisdiction of the Court, been exercised more beneficially than in building up the doctrines relating to the wife's separate estate. It is no small merit to have gained for married women that capacity of holding property and of contracting which the law denied them, and to have rescued the jurisprudence of our country from the imputation of barbarism under which it must otherwise have lain. Notwithstanding, however, what has been done for the ladies by our equity jurisprudence, I apprehend that they commonly refer to it with less affection than energy. They speak often, I am afraid, of that "horrid Court of Chancery," little knowing—and in their want of knowledge lies their excuse—what they owe to it, and to the equally horrid lawyers with their long deeds.

But the selection of the wife's separate estate recommends itself by other considerations. Amongst these

may be mentioned the circumstance that the equitable doctrines relating to the separate estate are of such recent origin, that their birth and growth can be traced with far greater distinctness than those of almost any other head of equity. The earliest commencement indeed of the separate estate cannot be carried more than two hundred years back; and the final settlement of some of the more important of its doctrines was, as we shall presently see, reserved for the chancellorship of Lord Cottenham. Lastly, at the present time, when everything which pertains to the relation of "*husband and wife*" is canvassed and criticised with the greatest minuteness, and when the approach of a struggle to place that relation on a different footing in regard to property is clearly discernible (a), the consideration of the wife's separate estate commands especial interest.

I propose dealing with the subject of my lecture in the following order, viz., I shall consider :—

1. The general doctrines of the Court respecting the *Separate Estate* and its modern adjunct, *Restraint on Anticipation*.

2. By what acts *inter vivos* the wife may alienate or affect her separate estate.

3. The wife's *testamentary power* over her separate estate.

4. The *devolution* of the separate estate where

(a) The struggle has since taken place, and its first fruits are to be found in the Married Women's Property Act, 1870 (amended by the Act of 37 & 38 Vict. cap. 50), of which a summary is given pages 57, 58, *ante*, but which affects only in a very minute degree the points discussed in this lecture.

the wife has neither aliened it in her lifetime nor disposed of it by testamentary instrument ; and

5. I shall make some special remarks respecting separate estate in *freehold* property.

At the same time I propose, so far as possible, treating my subject historically. It is probably true that in the study of our equity system (built up as it has been bit by bit) the chronological method is generally the soundest ; but certainly no one can be said to possess the master-key to the understanding of the doctrines of the separate estate who is ignorant of their history.

1.—As respects the general doctrines. At law the husband upon marriage became entitled to an estate during the joint lives of himself and his wife in his wife's freehold property, which estate upon birth of issue was enlarged into one for his own life—the estate by the courtesy. His wife's personalty became *his* absolutely, subject only to the necessity for reduction into possession spoken of in my fourth lecture (a). The wife, on the other hand, was after her husband's death entitled to dower, or to her jointure when a jointure had been provided in lieu, and also to a share of his personal estate ; but the notion of conferring upon her any rights of property *during the marriage*, was alike foreign to the principles of the common law and to the general feelings of our ancestors.

The only exception that I am aware of was in the case of the queen consort. Of her, Lord Coke says in his Commentary upon Littleton (b) : “ But by the

(a) Page 56, *supra*.

(b) Coke Litt. 133 a.

“ common law, the wife of the King of England is an
 “ exempt person from the king, and is capable of lands
 “ or tenements of the gift of the king, as no other
 “ *feme covert* is, and may sue and be sued without the
 “ king : for the wisdom of the common law would
 “ not have the king (whose continually care and study
 “ is for the publicke, *et circa ardua regni*) to be
 “ troubled and disquieted for such private and petty
 “ causes : so as the wife of the King of England is of
 “ ability and capacity to grant and to take, to sue and
 “ be sued as a *feme sole* by the common law.”

The earliest instances of conferring anything in the nature of separate property upon the wife during the coverture were, to the best of my research, those in which, upon a separation between husband and wife by agreement, a separate maintenance was secured to the latter. Such were the cases of *Sankey v. Goulding (a)*, decided in Queen Elizabeth's reign

(a) Cary's Rep. 124, Edition, 1820. This is the earliest reported case that I have hitherto met with recognising a separate maintenance. I transcribe it verbatim :—

“ The plaintiff setteth forth in her bill that she joined with her husband
 “ in sale of part of her inheritance, and after some discord growing betwene
 “ them they separate themselves ; and one hundred pound of the moncy
 “ received upon sale of the lands was allotted to the plaintiff for her
 “ maintenance, and put into the hands of *Nicholas Mine*, Esquire, and
 “ bonds then given for the payment thereof unto *Henry Golding*, deceased,
 “ to the use of the plaintiff ; which bonds are come to the defendant, as
 “ administrator to the said *Henry Golding*, deceased, who refuseth to
 “ deliver the same to the plaintiff, and hereupon she prayeth reliefe ; the
 “ defendant doth demur in law, because the plaintiff sueth without her
 “ husband ; and it is ordered the defendant shall answer directly. *Mary*
 “ *Sankey* alias *Walgrave* plaintiff, *Goulding* defendant. Anno 21 & 22
 “ *Eliz.*”

The wife's, or perhaps one ought to say the widow's right to her

about 1580, and of *Gorges v. Chancie* in the 15th Charles I. 1640 (a).

Next, so far as I can judge, came cases in which, pursuant to ante-nuptial agreement, a term in lands was limited to trustees upon trust to pay the rents and profits to the wife for her separate use during the coverture.

In "The Perfect Conveyancer," printed 1655, a book of precedents of considerable authority, I find no notice of any provision in favour of a married woman beyond limitations of jointures; but in the collection which we owe to the pen of Sir Orlando Bridgeman, who adhered to the royal party and practised only conveyancing during the commonwealth, you may see a precedent of a limitation of a term to trustees upon trust for the separate use of a married woman, which in fulness and accuracy of language is hardly surpassed by our modern forms (b).

It purports to be a demise after marriage by a hus-

paraphernalia, was recognised as early as the 26th Eliz. See Viscountess Bindon's Case, 2 Leonard's Reports, 166, placitum 201. But this right is, in its essence, different from that of the *separate estate*, as having no permanent vitality *during the coverture*; since the husband may sell or give away the wife's *paraphernalia* during his lifetime; though if he merely pledge them, the widow is entitled to have them redeemed out of his general personal estate: see *Seymore v. Tresilian*, 3 Atkyns, 358; *Graham v. Londonderry*, 3 Atkyns, 393.

(a) Referred to at Tothill, edit. 1649, p. 97; edit. 1671, p. 161; and more fully at 1 Cases in Chancery, 118. There is a kind of intermediate case of separate maintenance mentioned at Tothill, edit. 1649, p. 94; edit. 1671, p. 158 (*Fleshward v. Jackson*, 21 Jac.), where there had been no separation apparently, but the husband is stated to have been an *unthrift*.

(b) Bridgeman's Precedents, edition of 1682, p. 118; somewhat singularly, the precedent is repeated verbatim at p. 125.

band and wife, in pursuance of an agreement entered into before marriage, unto trustees for the term of sixty years, if the husband and wife shall both of them jointly so long live. The principal trust is as follows:—"Upon such trust and confidence nevertheless, as is hereinafter mentioned, that is to say, that they the said [*trustees*], their executors, administrators, and assigns shall, from time to time, during the said term, employ and dispose of all and singular the premises hereby demised, to and for the sole, proper, peculiar and separate use, benefit, and maintenance of the said [*wife*], and not for the use or benefit of the said [*husband*], nor as he shall direct; but shall from time to time, and at all times during the said term, pay, employ, and dispose of all the moneys to be had, levied, or raised out of the said premises (other than such moneys as shall be, from time to time, expended in managing and performing the trust hereby reposed, which it shall and may be lawful for them, from time to time, to deduct), into the proper hands of the said [*wife*], or into the hands of such person as she shall, from time to time, alone without the said [*husband*], by any writing or writings by her signed with her own hand, appoint the same to be paid, and not otherwise."

Then follow a stipulation not to dispose of the moneys to the husband, a proviso that if the husband be liable for any debts of the wife the trustees shall pay them, and covenants for title.

This precedent, penned as it probably was some two

hundred years ago—for the author of it became Chief Justice of the Common Pleas a few months after the Restoration of 1660, and presumably did not prepare drafts after that date—is certainly a remarkable instance of advanced conveyancing skill; and it may perhaps be regarded as the legitimate ancestor of our present pin-money forms—just as Sir Orlando himself has been called the father of conveyancing—though the word “pin-money” does not once occur in it. Be this as it may, a separate allowance to a wife during marriage for personal expenses may claim an antiquity of some two hundred years.

In reference to the precise date of the origin of the separate estate in the larger sense, as extending beyond a mere personal allowance, that may be fixed some time between the years 1668 and 1705. At the earlier of those dates we find it attempting to struggle into existence in the form of an ante-nuptial contract by the husband with the wife, and foiled in its efforts by the very Sir Orlando Bridgeman (then Lord Keeper) who penned the form to which I just now called your attention. I refer to the case of *Pridgeon v. Pridgeon* (a). In that case the plaintiff, the wife of Sir Francis Pridgeon, suggested that the latter before his marriage agreed with her, *and others on her behalf*, that notwithstanding her marriage, “the rents and profits of all her own estate and what personal estate and goods she had should be at her own disposal.” Final judgment does not appear to have been given;

(a) 1 Cases in Chancery, 117.

but the Court intimated its view to be that, "where
"an agreement between *baron* and *feme* is to have
"execution during the coverture, the marriage extin-
"guisheth such an agreement;" a result which I may
observe was not only unsound, as importing into equity
a mere technical rule of law, but difficult to sustain
upon the agreement stated, which is said to have been
not merely with the wife, but *with friends on her behalf*.
Sir Orlando, however, though the most eminent of
conveyancers, was admittedly but ill acquainted with
equity doctrines.

At the latter date (1705), we find, on referring to
the case of *Gore v. Knight* (a), that the separate
estate, at least under the guise of a power reserved to
a married woman before her marriage to dispose of
her personal estate by deed or will was then fully
recognised.

The precise mode in which in this particular case
the power was reserved does not appear; but the whole
tenour of the report shows that a separate estate in
the corpus of property was then known to the equity
courts. It may, however, be fairly inferred from a
number of the *Spectator* (the 295th, one of Addison's),
to which the attention of the legal world was first
called by a most entertaining note to Lord St. Leon-
ards' treatise on the Law of Property, as adminis-
tered by the House of Lords (b), that at the time
when the number was written (and it bears date some
seven years later than the decision in *Gore v. Knight*)

(a) 2 Vernon, 535.

(b) Vide page 165 of the treatise.

the separate estate was by no means in general usage ; and the views put forward by Addison may perhaps be accepted as not unfairly reflecting the general disfavour with which separate provisions for wives were at first regarded.

In the article referred to, an imaginary correspondent of the *Spectator* (Mr. Josiah Fribble), after detailing the circumstances under which he agreed to pay his wife 400*l.* a year for pin-money, and his domestic miseries flowing therefrom, says, "I hope, "sir, you will take occasion to give your opinion upon "a subject which you have not yet touched, and inform us if there are any precedents for this usage "among our ancestors, or whether you find any mention of pin-money in Grotius, Puffendorff, or any "other of the civilians." Upon this fictitious provocation the *Spectator* proceeds to give his opinion freely against pin-money, the following being his opening observations: "As there is no man living who is a "more professed advocate for the fair sex than myself, "so there is none that would be more unwilling to "invade any of their ancient rights and privileges; "but as the doctrine of pin-money is of a very late "date, *unknown to our great-grandmothers, and not yet* " *received by many of our modern ladies*, I think it is "for the interest of both sexes to keep it from "spreading."

Thus much for the *Spectator's* opinions respecting the general propriety of separate provisions in the shape of pin-money. The inference that the separate estate in the general sense could hardly have been in

general use at the time when Addison wrote, is derivable rather from the tenour of the whole article than from any particular passage. Throughout the whole essay, which treats the mere existence of a separate allowance as objectionable on the general principle "that "separate purses between man and wife are as unnatural as separate beds," we find not a single allusion to any practice, either established or incipient, of reserving to the wife a power of disposition over her own property. Had any such course been otherwise than rare, it would probably have been alluded to by the *Spectator*, in his *quasi* judicial observations, as equally objectionable with pin-money.

The general result, then, of my research may be thus stated:—First in order of antiquity came *maintenance* to a wife separated from her husband; then an allowance for personal expenses during marriage, or *pin-money*; and last of the three, *separate estate* generally, though under the guise in the first instance of a power.

We pass now to the next step in the history of the separate use, namely, its establishment independently of any agreement with the husband. The earliest instances of "separate estate" are undoubtedly those in which the privilege was obtained through the medium of an express contract by the husband. It would seem further to have been admitted early in the history of the separate estate, that by interposing a trustee, property might be given for the separate use of a married woman without any contract on the part of the husband. But suppose property given to the

wife herself, with a direction that it should be for her separate use. What then was the result? It was suggested that the property became the wife's, and, through her, her husband's, and that *he* was bound by no agreement. The answer was clear—the separate estate was a species of trust—the trust should not fail for want of a trustee—if the husband took any legal interest, he would hold it as trustee for his wife. You will find the doubt raised by Lord Chancellor Cowper in 1710 (*a*), and disregarded in 1725 by the then Master of the Rolls, Sir Joseph Jekyll (*b*); since which case it has, I believe, never been put forward.

You will however of course bear in mind, that where no trustees are interposed, the legal rights of the husband and of those claiming through him remain unaffected, so that *at law* chattels personal to which the wife is entitled for her separate use may be taken in execution for the husband's debt (*c*). Equity will, however, in these cases interpose and protect the wife (*d*).

Passing on now some seventy years or so, we reach

(*a*) *Harvey v. Harvey*, 1 Peere Williams, 125.

(*b*) *Bennet v. Davis*, 2 Peere Williams, 316.

(*c*) This statement must now be qualified. It was settled, after some difference of opinion, that a Court of law would, upon an interpleader issue, take notice of equitable claims, *Rusden v. Pope*, 2 L. R. 3 Exch. 269; and therefore of the equitable rights of a married woman in respect to chattels seized by the sheriff for the debt of her husband, *Duncan v. Cashin*, L. R. 10 C. P. 554; and so far as respects chattels made separate property by the Act of 1870, the 11th section (see p. 57, ante) gives the married woman the same remedies, both civil and criminal, in her own name as if she were unmarried.

(*a*) *Newlands v. Paynter*, 4 Mylne & Craig, 408.

a most important epoch in our history—that, namely, of the invention of the clause restraining the married woman's power of anticipation. It had by that time become apparent that the absolute power of disposition given to the married woman over her separate estate was really a fatal gift. Her husband, in many instances by undue influence, in some possibly by threats, induced or compelled her to dispose of her separate estate in furtherance of his own selfish views. At last a case occurred which forcibly directed attention to the unsatisfactory state of the law. I mean Pybus v. Smith (a).

In that case the question arose upon the post-nuptial settlement of a female ward of the Court of Chancery (a Mrs. Vernon) which had been executed in pursuance of a decree of the Court. By the settlement, which bore date May, 1785, real estate had been vested in trustees upon trust during the wife's life, to pay the income as the wife should *from time to time appoint*, and in default for her separate use, and there was a similar trust as to the dividends of a sum of stock, excepting that the words "*from time to time*" were omitted in the power. In August, 1785, the wife joined in incumbering her life interest. The incumbrancers filed their bill to have the benefit of their security. The nature and result of the suit is thus graphically described by Lord Eldon (b). "So in "*Pybus v. Smith*, the Court settling the property (c),

(a) 1 Vesey Jun. 194 ; 3 Brown's Ch. Ca. 340.

(b) *Jones v. Harris*, 9 Vesey, 493.

(c) His Lordship here alludes to the settlement of 1785.

“ with all the anxious terms then known to convey-
“ ancers, in a day or two afterwards, while the wax
“ was yet warm upon the deed, the creditors of the
“ husband got a claim upon it by an informal instru-
“ ment; and the same judge who had made such
“ efforts to protect her (meaning Mrs. Vernon, the
“ wife), was upon authority obliged to withdraw that
“ protection.” In fact, Lord Thurlow, after struggling
hard to extract from the words “ from time to time ”
a fetter on alienation, held that he was bound by the
decisions.

However, in delivering judgment in *Pybus v. Smith*, Lord Thurlow expressed his opinion to be, “ that
“ if it was the intention of a parent to give a pro-
“ vision to a child in such a way that she could not
“ alienate it, he saw no objection to its being done ;
“ but such intention must be expressed in clear
“ terms ” (a). And subsequently on becoming a
trustee of Miss Watson’s marriage settlement, he
directed the words “ and not by anticipation ” to be
added to those of the ordinary separate use clause ;
and the binding effect of the addition has never since
been doubted.

The next epoch in the history of the *separate estate*
was the decision in *Tullett v. Armstrong*, a decision
finally setting at rest a series of questions, resulting
mainly from the invention of the restraint on anticipa-
tion, which required some forty years for their com-
plete solution, and which must be noticed before
touching the case itself.

(a) 3 Brown’s Ch. Ca. 347.

In considering the effect of any given clause conferring the separate estate with restraint on anticipation, the first question of course was, and still is (a) to ascertain whether the separate use and restraint were in terms limited to some particular coverture, or were intended to apply generally to every marriage. This must occasionally be a matter of some difficulty (b).

But further, where the clause was general in its scope, various difficulties presented themselves. Thus, suppose property limited to the separate use of an unmarried woman, independently of *any* husband whom she might marry, with a restraint on anticipation; what were her rights in such a case? Would the separate use with its attendant restriction arise upon a future marriage, in despite of the *feme*? or had the *feme* power to alien while *sole*? This was a difficulty entirely due to the introduction of the restrictive clause, since, under a limitation to her separate use

(a) A question to be considered in precedence to those mentioned in the text is, of course, the general force and effect of the clause itself. For instance, in a recent case, *Croughton's Trusts*, 8 Ch. D. 460, it was held by Bacon, V.-C., that words restraining "anticipation," and making the receipt of the married woman a sufficient discharge, were insufficient to operate as a restraint on her right to receive the corpus of a fund producing no income. In a previous case, *Ellis' Trusts*, L. R. 17 Eq. 409, it was held by the Master of the Rolls that where a fund producing income is given to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from receiving or alienating the fund during coverture. If these cases are to stand together, the true distinction must, it is conceived, be sought in the different terms of the clauses restraining anticipation, and not in the different natures of the property.

(b) See, as instances, *Gaffee's Settlement*, 7 Hare, 101, and on appeal, 1 Macn. & Gor. 541; *Moore v. Morris*, 4 Drewry, 33; and *Hawkes v. Hubback*, L. R. 11 Eq. 5.

simply, the wife would have a right of alienating upon either view. It was decided that the *feme* had an absolute right of alienation. The restraint on anticipation was a fetter on the general rights of property which equity would allow in the case only of a married woman (*a*). The gift was therefore equivalent to an absolute gift, subject to a modification which the law did not suffer in the case of a *feme sole*, and she might therefore dispose of the property (*b*).

Again, where the gift to separate use with restraint was in favour of a married woman whose husband subsequently died, the same question arose as to the rights of the widow. It was held in this case also, upon similar principles, that upon the coverture ceasing the restraint ceased also, and that the widow might alienate as she thought fit (*c*).

(*a*) In a recent case the present Master of the Rolls said, "The law of this country says that all property shall be alienable, but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law, which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it her without such a restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property." *In re Ridley*, 11 Ch. D. 640.

(*b*) This was so decided by Lord Brougham, in *Woodmeston v. Walker*, 2 Russell & Mylne, 197; and *Browne v. Pocock*, 2 Russell & Mylne, 210, overruling Sir John Leach's decisions to the contrary.

(*c*) See *Jones v. Salter*, decided by Sir William Grant, some fifteen years before Lord Brougham's decision in *Woodmeston v. Walker*, but reported in the same volume, 2 Russell & Mylne, 208.

But a third and still more important question remained, one which might at any time have arisen in reference to the separate use alone, previously to the introduction of the restrictive clause, but which after its introduction, became of far greater importance. It was this: In the case of a gift to the separate use, either with or without restraint on anticipation, so expressed as to be applicable to any marriage with any husband, what were the rights of a first husband where the donee, being a *feme sole*, married without exercising her power of alienation? And again (which was substantially the same point), what were the rights of a second husband where the donee, being a *feme covert*, became a widow and remarried without having aliened during her widowhood?

Taking first the case of a gift to the separate use simply, the opinion of Lord Cottenham originally was, that when the estate and interest of the *feme* had once become absolute, either in consequence of her being unmarried or of the coverture being determined by the husband's death, the quality of separate property could not, upon a subsequent or second coverture, be revived. This was the effect of his judgment in the case of *Massey v. Parker (a)*, which for some four years threw the legal profession into agitation. On the other hand, the late Vice-Chancellor of England considered that the separate estate, if not interfered with previously to marriage or remarriage, survived, so to

(a) 2 Mylne & Keen, 174.

speak, into the subsequent or second coverture, as the case might be (a).

As regarded the *restraint on anticipation* (which in Lord Cottenham's view necessarily fell with *the separate use*, to which it was a mere appendage), the Vice-Chancellor of England held that though the *separate use* did revive, *the restraint on anticipation*, when once at an end, could not do so.

It was reserved for the great case of *Tullet v. Armstrong*, in which, in 1838, the whole question was reconsidered and reviewed, first by Lord Langdale, and subsequently by Lord Cottenham, to overrule both Lord Cottenham's views and a series of decisions of the Vice-Chancellor of England. XX

In *Tullet v. Armstrong* (b), Lord Langdale, upon an elaborate review of the authorities, held that the *separate use*, and the *restraint on anticipation*, must, in regard to their operation in the event of a subsequent or second coverture, stand or fall together; and that where either the unmarried woman before marriage, or the widow before a second marriage, omitted to exercise her power of alienation, there either the *separate use*, or the *separate use* with its accompanying *restraint*, would, if apt words were used, revive, so to speak, upon the marriage or second marriage, as the case might be.

Lord Cottenham (c), when the same case came before him on appeal, was clearly of opinion that the

(a) See *Davies v. Thornycroft*, 6 Simons, 420.

(b) Reported at the Rolls, 1 Beavan, 1.

(c) 4 Mylne & Craig, 377.

separate use and restraint on anticipation must stand or fall together. He seems, however, to have doubted greatly whether any satisfactory principle could be found upon which the preservation of the separate estate, during a subsequent or second coverture, could be supported; but ultimately receding from his former opinion as expressed in *Massey v. Parker*, and founding his decision rather upon its presumably beneficial tendency than upon its logical correctness, he affirmed the judgment of the Master of the Rolls, consoling himself with the reflection that, in the exercise of his judicial power, he was not doing more than his predecessors had done for similar purposes.

This decision may be said to form the last great epoch in the history of the separate use.

2.—I pass to the consideration of the question, By what acts "*inter vivos*," the wife may alien or affect her separate estate?

Here we find a gradual progressive development, which, even at the present day, cannot be said to have reached full growth. The wife's power of alienating her separate estate by any written instrument denoting her intention of so doing, was necessarily always an essential ingredient in the notion of separate property. At a later date, it was held that if a married woman, entitled to a separate estate, professed to bind herself by any written instrument, the execution of which by her would be nugatory unless it operated against her separate property, the Court would infer a contract by her to bind her separate estate. Thus a married woman executed a bond, or signed a promissory note.

Her execution or signature would be worthless if viewed as evidence of a mere personal engagement; and the courts of equity therefore said, they should be evidence of a contract to bind her separate estate. The leading case upon this point may be said to be *Hulme v. Tenant*, decided by Lord Thurlow (a). There a married woman entitled to rents and profits of real estate for her life for her separate use, joined with her husband in executing a bond; and Lord Thurlow held that her separate estate was made liable by the bond. Lord Eldon frequently expressed his disapprobation of this decision. However, it was followed by Sir Wm. Grant in the cases of *Heatley v. Thomas* (b) and *Bulpin v. Clarke* (c); and the law is now clearly settled, as I before stated it.

But though it must now be held to have been law, as from the time of Lord Thurlow's decision in *Hulme v. Tenant*, that the contract of the married woman, neither referring to her separate estate nor professing to bind it, but purporting merely to bind herself personally, bound her estate and not herself; and although the general reason for so holding was perfectly clear, viz., "*ut res magis valeat*," the precise

(a) 1 Brown's Ch. Ca. 16.

(b) 15 Vesey, 596; a case of a bond given by the wife as surety.

(c) 17 Vesey, 365; a case of a promissory note signed by the wife. And see *McHenry v. Davies*, L. R. 10 Eq. 88, in which case a bill and a cheque were endorsed and drawn respectively by the wife; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572, in which case the document relied on was a letter of instructions addressed to bankers; and *Mayd v. Field*, 3 Ch. D. 587, in which case the wife had, in a settlement executed on her daughter's marriage, covenanted for payment of a sum of money within six months after her death.

mode in which the contract operated remained for a long series of years in doubt.

The views on this subject were mainly two.

The first, and this the wrong one according to the law as now settled (*a*), that the dealings of the married woman were to be viewed as the execution of a power, or at all events as operating by way of disposition; those who maintained this view attempting to assimilate the case to that of a man who, having a power but no estate, professes to convey his estate, and is held to have executed his power.

The second view, and this the correct one, was, that the married woman having contracted to pay generally, and being unable to bind herself personally, should be held to have contracted to pay out of her property.

The two most important cases on this point are *Murray v. Barlee* (*b*), decided by Lord Brougham, and *Owens v. Dickenson* (*c*), decided by Lord Cottenham. Both these learned lords point out very clearly that the bond, promissory note, or other instrument, cannot possibly be treated as an execution of a power, since they neither refer to the power nor to the subject-matter of disposition; and, besides, that if these engagements of married women really operated as appointments under power, they would, in the event

(*a*) The doctrine that the dealings are to be viewed as operating by way of disposition received the sanction of Lord Romilly, see *Shattock v. Shattock*, L. R. 2 Eq. 182, pp. 193, 194; but this decision was dissented from by the Judicial Committee of the Privy Council; see *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572.

(*b*) 3 Mylne & Keen, 209.

(*c*) Craig & Phillips, 48.

of a married woman entering into many such engagements successively, be satisfied in order of date, the earlier engagements taking priority over the later; whereas it was and is admitted that in these cases all those claiming under similar engagements rank "*pari passu*."

The principles upon which the engagements of a married woman, though not referring to her separate estate, are held to bind that estate, may be treated as now clearly settled by the judgments of Lord Brougham and Lord Cottenham, in the cases just mentioned; and in a very recent decision of Vice-Chancellor Wood (*a*), that learned judge, adopting the rule as laid down in *Murray v. Barlee*, and *Owens v. Dickenson*, expresses himself thus: "Wherever a married woman has property settled to her separate use, and she enters into any contract by which it clearly and manifestly appears that she intends to create a debt, as against herself personally if the expression may be used, it will be assumed that she intended that the money should be paid out of the only property by which she could fulfil the engagement" (*b*).

But though the principles have been thus settled, there remains yet one point uncovered by decision. To what extent, if at all, do the "general verbal engagements" of a married woman bind her separate estate?

(*a*) *Bolden v. Nicolay*, 3 Jurist (N.S.), 884.

(*b*) See, in accordance with this doctrine, *Matthewman's case*, L. R. 3 Eq. 781, where a married woman was held to be a contributory in respect of shares taken by her in a company, and *Picard v. Hine*, L. R. 5 Ch. 274; *McHenry v. Davies*, L. R. 10 Eq. 88.

The difficulty, if one may say so without presumption, seems to have been somewhat nursed into importance by the over-cautious language of those judges whose decisions furnish us with the soundest principles. Thus Lord Cottenham, in *Owens v. Dickenson*, says (a): “I observe that in *Clinton v. Willes*, 1 Sugd. Pow. 208, *n.*, Sir Thomas Plumer suggested a doubt whether it was necessary that the *feme’s* engagements should be secured by writing: it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognised in any other case. *On that point, however, I give no opinion at present.*”

If we were to hazard a conjecture as to the origin of Sir Thomas Plumer’s doubt, it would be this:—he, like Sir J. Leach (b), considered that the dealings of the married woman were all by way of disposition of an equitable interest, and not by way of contract. If so, the engagement ought to be viewed as an assignment of a trust; and then, by the Statute of Frauds (c), would require to be in writing. The moment, however, it was clearly settled that the engagement operated by way of contract and not of disposition, all conceivable ground for distinction between a written and an express verbal agreement was taken away. If a married

(a) Craig & Phillips, p. 55. The reference to Sugden on Powers in the passage quoted is to the 6th edition.

(b) See *Greatley v. Noble*, 3 Maddock, 79; *Stuart v. Kirkwall*, *ib.* 387.

(c) 29 Car. II. cap. 3, s. 9.

woman, having a separate estate, says by word of mouth, for a good consideration, "I agree to pay you "£100 this day fortnight," her separate estate must, on every principle, be held bound.

There remains, however, one class of cases in which considerable difficulty must often exist upon the question whether the separate estate is bound. I mean those in which there is no distinct engagement by the wife, *written or verbal*, to bind herself—where, in fact, the engagement is to be implied from her acts. Thus a married woman, having a separate estate, and living apart from her husband, is supplied by tradespeople with necessaries suitable to her condition in life. Is her separate estate bound? In the absence of any course of dealing or conduct to lead to a conclusion, the answer must, I think, depend upon whether the circumstances are such that the married woman was entitled to pledge her husband's credit? Thus, if she were living apart from him, not by her own fault and without any allowance, he would be liable for suitable necessaries, and she ought to be held to have pledged *his* credit, and not her separate estate. If not entitled to pledge her husband's credit, her separate estate ought, I conceive, to be held bound (a).

It is, however, right that you should understand that the whole question of the circumstances under which the verbal engagements of married women will be held

(a) See *Wright v. Chard*, 4 Drewry, 684; *Johnson v. Gallagher*, 7 Jurist (N.S.), 274; 3 De Gex, F. & J. 494; *Shattock v. Shattock*, L. R. 2 Eq. 182; *The London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *In re Harvey's Estate*, 13 Ch. D. 216.

to bind their separate estate, must be treated as still requiring to be settled by express decision (a).

There is one other mode in which a married woman may dispose of her separate estate, *being in the nature of income*, which demands some brief mention ; I mean, by letting her husband receive it. If she do this, it is clear that neither she nor her representatives can claim against him or his representatives *more* than one year's arrears. Whether *any* arrears can be claimed must be considered a doubtful point (b). As respects that particular species of separate estate known as pin-money, the House of Lords, in a celebrated case which has been severely criticised by Lord St. Leonards, I mean *Howard v. Digby* (c), decided that no arrears were recoverable.

3.—We proceed to consider the wife's power of disposing of her separate estate by a testamentary instrument.

So late as Lord Thurlow's time, it appears to have

(a) See the elaborate judgment of Vice-Chancellor Kindersley in the case of *Vaughan v. Vanderstegen*, 2 Drewry, 165, and more particularly the observations of the Vice-Chancellor, at page 183 ; and the cases mentioned in note (a), page 177, *supra*.

(b) The state of the authorities is concisely stated in "Lewin on Trusts," 5th ed. p. 550, in the following words :—"Lord Macclesfield, Lord Talbot, Lord Loughborough, Sir William Grant, and Lord Chancellor Brady, held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell, Lord Camden, Lord King, Lord Hardwicke, Lord Eldon, Sir J. Leach, Sir J. Stuart, Lord St. Leonards, and Smith, M.R., in Ireland, the husband's estate is liable to an account for one year." Mr. Lewin adds, "The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate."

(c) 2 Clark & Finnelly, 634.

been thought a fair point for contest, whether a married woman could, unless in exercise of a power expressly reserved for that purpose, dispose of her separate estate by a testamentary instrument.

But upon principle, the moment the equity courts had determined to treat the married woman as a *feme sole* in respect to property given to her separate use, the right of testamentary alienation followed as of course. One of the earliest cases respecting the testamentary power of married women is that of *Gorges v. Chancie*, which I have previously mentioned (a). It was there held that a *feme covert*, separated from her husband, might dispose by will of the savings of her separate allowance. It is difficult to suppose that in this case any express power was reserved, and, if not, it is conclusive in favour of the general principle. But, however this may be, in *Fettiplace v. Gorges* (b), it was expressly determined by Lord Thurlow that a gift to a married woman for her separate use simply, carried with it as an incident a right of testamentary alienation, and the question has ever since been treated as clearly settled.

It is equally undoubted that this right of testamentary alienation extends to savings of income. The

(a) Page 159, *supra*. See, too, *Witham v. Waterhouse*, Tothill, 91.

(b) 1 Vesey, Jun. 46 ; and see *Bishop v. Wall*, 3 Ch. D. 194, where property was settled to the separate use of a married woman if she survived her husband (which event happened), but if she did not survive him, then according to her appointment by deed or will ; and a will made by her ostensibly in exercise of the power (which never arose), and by virtue of all other powers was held a good disposition of the property by virtue of her separate ownership.

old case in *Tothill* shows this ; and, in that of *Gore v. Knight* (a), the case of a power, the principle is thus figuratively expressed : “ As she had a power over the “ principal, she consequently had it over the produce “ of it, for the sprout is to savour of the root, and “ to go the same way.” In a late case decided by the Master of the Rolls (b), you will find the decision in *Gore v. Knight* recognised and commented on.

It is a matter of some difficulty to say how far this testamentary power will be recognised at law in cases where the property is given to the wife for her separate use, without the interposition of any trustee (c). I may observe, however, that at the present day the power of pleading equitable defences at law (d) may remove some difficulties when the husband sues at law ; and that you may take for granted, that should the husband in

(a) Referred to page 162, *supra*.

(b) *Humphrey v. Richards*, 2 Jur. (N.S.), 432. But savings by the wife out of moneys given to her by the husband for dress, &c., belong to *him* ; *Barrack v. McCulloch*, 3 Kay & Johnson, 110 ; though savings by a wife, living apart from her husband, out of moneys allowed to her for her separate maintenance, would seem to be her separate estate, *Brooke v. Brooke*, 4 Jurist (N.S.), 472 ; s. c. 25 Beavan, 342. And the maxim that “ the sprout is to savour of the root ” does not annex to savings of income a restraint on anticipation to which the principal fund is subject, *Butler v. Cumpston*, L. R. 7, Eq. 16.

(c) Consult, in reference to this point, the cases of *Messenger v. Clarke*, 5 Exchequer R., 388 ; *Tugman v. Hopkins*, 4 Manning & Granger, 389 ; *Carne v. Brice*, 7 Meeson & Welsby, 183. It would seem that the late Master of the Rolls considered the decision in *Messenger v. Clarke* as resting on the inability of the Common Law Courts to recognise this testamentary power ; see *Brooke v. Brooke*, 4 Jurist (N.S.), 473.

(d) 17 & 18 Vict. cap. 125, s. 83. The difficulty on this head has been removed by the rules embodied in section 24 of the Judicature Act, 1873.

any case succeed in recovering at law any separate estate, or accumulations thereof, he would, so far as they might be well bequeathed by the wife, hold them upon trust for those to whom she bequeathed them.

4.—As to the devolution of the separate estate, where the wife has neither alienated it in her lifetime nor disposed of it by testamentary instrument.

In the consideration of this question, you must of course bear in mind, that in by far the larger number of cases the control of a wife over her own property is preserved by means of a power of appointment by will, with a gift in default of appointment amongst her next of kin excluding her husband. Where this is so, if the wife make no will, still the husband gets nothing, because the parties entitled as in default of appointment, take (a).

But the case to which I have now to direct your attention is that of property which is settled, or agreed to be settled, simply for the separate use of a married woman, who dies without exercising her privilege of alienation. In this case, upon the death of the married woman the property will devolve in the same manner as it would have done had it never been secured to her separate use. By her death, the coverture determines, the separate use drops off, and the property, regaining its simple original quality, goes to the wife's heir, if

(a) But if the wife should die without next of kin, as for instance where she is illegitimate and has no issue, the rights of the husband to her personal estate are unaffected, and will prevail over any claim of the crown; see *Hawkins v. Hawkins*, 7 Simons, 173, the decision in which case is, in principle, the same as that in *Proudley v. Fielder*, mentioned in the body of the text.

it be real estate (a) and to her husband, either in his marital right, or as an administrator, if it be personal estate.

Sir John Leach, I believe, first distinctly decided that this was the true view of the question, in the case of *Proudley v. Fielder* (b). In that case it had been stipulated by marriage articles that certain moneys in the funds, the property of the intended wife, should be for her sole and separate use to all intents and purposes, as if she were sole and unmarried. She died intestate, leaving her husband surviving. The next of kin claimed the property against the husband; but Sir John Leach held the latter entitled. His judgment was as follows: "These moneys were
" to be for the sole and separate use of Mrs. Leader,
" as if she were sole and unmarried. This expression
" has no reference to the devolution of the property
" after her death. She is to retain the same absolute
" enjoyment of the moneys, and is to have the same
" power of disposition over them, as if she were sole
" and unmarried; but there is not one word here to
" vest the property after her death in her next of kin,
" or to defeat the right which her surviving husband
" is entitled to acquire as administrator."

You observe that Sir John Leach speaks of the husband being entitled as administrator. Whether in order to clothe his right with a legal title, it is neces-

(a) Subject, whether the wife's interest be legal or equitable, to the husband's right as tenant by the curtesy; see *Appleton v. Rowley*, L. R. 8 Eq. 139.

(b) 2 Mylne & Keen, 57.

sary for the husband to take out administration or not, depends merely upon the nature of the property affected by the separate use.

To ascertain what the husband's rights are, assume merely that the separate use, which drops off at the very instant of death, is out of the way. Is the wife, at the moment of death, entitled to chattels personal, passing by manual delivery, such as furniture or cash? Then as the husband might but for the separate use have taken possession of them, so at the very moment of death he takes them in his marital right simply, and no administration is needed (*a*).

If, on the other hand, the property be of such a nature that the husband, in the absence of any separate use, could have claimed only as administrator, as is the case in respect to the wife's choses in action, such as a sum of money secured to the wife by mortgage executed to her before marriage, then he must equally, after the separate use has dropped off, clothe his title with an administration.

5.—In the observations previously made, no distinction has been taken between personal and real estate; and if one might, without presumption, hazard a prediction, it would be that ere long separate estate in freeholds of inheritance will be placed on the same footing as that in personal estate (*b*).

It cannot, however, be said that this has yet been

(*a*) See *Molony v. Kennedy*, 10 Simons, 254; *Bird v. Peagram*, 13 Common Bench R. 639.

(*b*) See note at page 186, giving the history of the subsequent decisions verifying this prediction.

distinctly done. The nearest approaches yet made in the direction of assimilation, together with what yet remains to be accomplished, shall be briefly pointed out.

First, the case of *Baggett v. Meux*, decided by L. J. (then V.-C.) Knight Bruce, below (a), and by Lord Lyndhurst on appeal (b), decides that both the *separate use* and the *restraint on anticipation* may be annexed to a gift of real estate in fee to a married woman; and that a court of equity will give effect, both to the separate use and the restraint, during the coverture.

Next, it is clear that where a married woman is entitled to an estate for her own life, in real property, to her separate use, she may contract to sell, or charge, or encumber her whole life estate (c). And it may be taken to be settled, that, at least so far as respects her equitable interest, a conveyance by deed acknowledged is not necessary. Where the legal estate in the land is in the wife, upon principle a deed acknowledged would seem requisite to bind the legal estate, though in a case in Ireland (d) the Master of the Rolls there appears to have thought even this unnecessary.

Lastly, though upon the principles laid down in *Baggett v. Meux* the wife ought to possess the same power of alienation over real estate held to her separate use simply as over personalty, the question whether she can, as respects freeholds of inheritance settled to her

(a) 1 Collyer, 138.

(b) 1 Phillips, 627.

(c) *Stead v. Nelson*, 2 Beavan, 245; and *Wainwright v. Hardisty*, 2 Beavan, 363.

(d) *Newcomen v. Hassard*, 4 Irish Ch. Rep. 274. See *Hall v. Waterhouse*, 11 Jurist (N.S.), 361; 6 New Reports, 20.

separate use, bind them either by deed not acknowledged, or by testamentary instrument, remains yet to be determined.

In the Irish case just before referred to, the Master of the Rolls for Ireland seems to have considered that freehold interests of the wife extending beyond her own life, could be bound only by deed acknowledged. The original doubts upon the subject are due to Lord Hardwicke's views, as expressed in *Churchill v. Dibben* (a), and to an anonymous case referred to in *Peacock v. Monk* (b); and probably were the result in the first instance of the notion either that the heir was an object of special favour in the eye of the law, or else that, not being a party to the instrument creating the separate use, he could not be bound. As respects the last suggestion, the same principles which bind the husband in the case of personal estate without his consent, ought equally to bind the heir in the case of a real estate (c).

It cannot, however, be denied that these doubts have acquired considerable weight. In the late case of *Harris v. Mott* (d), they were considered by the present Master of the Rolls sufficient to deter him from decreeing a specific performance. In that case real estate had been devised to a married woman, to and for her own sole and separate use and benefit. She and her husband contracted to sell; and before completion she died, having devised to her husband; and

(a) 2 Lord Kenyon's Reports, part ii. p. 84, and 9 Simons, p. 451.

(b) 2 Vesey Sen., 192.

(c) See page 165, supra.

(d) 14 Beavan, 169.

the Master of the Rolls thought he could not properly compel the purchaser to take the title in the absence of the heir.

If one were to reason from the past history alone of the separate estate, the ultimate establishment of a power in the married woman to bind *in equity*, either by instrument not acknowledged or by her will, her separate estate in fee simple interests would seem a probable event; and it is to be hoped that the general symmetry of this beneficial creation of equity will not be marred by the anomaly which would be presented by the absence of such a power.

Meanwhile we must wait patiently, until occasion shall arise for solving the doubts which unfortunately impair, for the present, the completeness of that system, a general outline of which I have this evening endeavoured to present to you (a).

(a) The doubts referred to may be considered as having been finally solved, and the general power of the married woman to bind her separate estate, established by the decision of Lord Westbury, in *Taylor v. Meads*, 5 New Rep. 348; 34 Law Journal (N.S.), Chanc. 203; 4 De Gex, Jones & Smith, 497. The history of the intermediate decisions and dicta was as follows:—In June, 1861, in the case of *Adams v. Gamble*, 12 Irish Chancery Reports, 102, it was held by Lord Justice Blackburn and Mr. Baron Hughes (Lord Chancellor Maziere Brady dissenting and adhering to his original decision, reported 11 Irish Chancery Reports, 269) that a descendible freehold settled to the separate use of a married woman might be disposed of by her as if she were a *feme sole*. In May, 1863, in the case of *Lechmere v. Brotheridge*, 32 Beavan, 353, Lord Romilly, M.R., agreeing with the Irish dissentient judge, ruled that the equitable estate in fee simple of a married woman, held for her separate use, can be disposed of only by deed acknowledged. The authorities and dicta will be found elaborately reviewed in the judgments of the Irish Judges and of the Master of the Rolls. In 1864, in the case of *Hoare v. Osborne*, 33 Law Journal (N.S.), Chancery, 586; see page 591, Kindersley, V.-C. (ad-

hering to his view expressed at 4 Drewry, 38) treated it as clear, that "the fee simple of real estate cannot be settled to the separate use of a married woman so that by her will she may dispose of it as if she were a *feme sole*." On the other hand, about two months later, Lord Romilly, in *Taylor v. Meads*, 4 New Rep. 203, intimated that his decision in *Lechmere v. Brotheridge* must be understood as applying only to the power of disposition of the married woman over her fee-simple property by act *inter vivos*; and, it being (according to the views of Lord Romilly, upon another point) unnecessary so to do, his lordship declined to express any opinion upon the question whether a married woman had or had not, as incident to her separate estate in fee simple, a general power of testamentary disposition, saying that the point was one of considerable difficulty. On appeal, Lord Westbury differed from Lord Romilly upon the point which had rendered unnecessary any decision as to the general power of the married woman, and, in a considered judgment, held that where real estate is vested in trustees upon trust for the separate use of a married woman (without restraint on alienation) she has, as incident to her separate estate, and without any express power being conferred on her, a complete right of alienation, either by instrument *inter vivos*, not acknowledged under the Fines and Recoveries Act, or by will, and that there is no distinction in this respect between an equitable fee and any other property. In *Hall v. Waterhouse*, 11 Jurist (N.S.), 361; 6 New Reports, 20, decided about two months after *Taylor v. Meads*, it was held that a devise of real estate without the interposition of trustees, to a married woman and her heirs for her separate use, conferred on her a right of disposition by will of the equitable fee in like manner as if she were discoverte, the legal fee however passing to her coheiresses at law. In *Pride v. Bubb*, L. R. 7 Ch. 64, the general right of a married woman to dispose of her separate real estate by deed or will as a *feme sole* was recognised and affirmed.

LECTURE VIII.

I APPROACH the subject of "Account, as an instance of the concurrent jurisdiction in equity," with very different feelings from those with which I opened my last lecture; for under the head of Account we find ranged some of the most embarrassing questions in reference to equity jurisdiction—questions, too, which we are obliged to solve as we best may by reference to authoritative decision rather than to principle (*a*).

Bear in mind, that I am now considering not *account*, generally, but *account* as an instance of *concurrent* jurisdiction. "Account," in some shape, enters more or less largely into almost every head of equity jurisdiction; whether *exclusive* or *concurrent*. Thus, as respects the *exclusive* jurisdiction: in matters of trust, trustees' accounts are taken; in matters of adminis-

(*a*) Amongst the benefits conferred by the Judicature Act, 1873, may be reckoned the fact that the solution of the questions above referred to has now become unnecessary. The lecture is considered, however, to possess sufficient interest and utility to warrant its being retained amongst those republished. As respects the probable operation of the Act, see note at conclusion of this lecture.

tration, the taking of accounts forms the most important part of the duty of the equity court; and in suits for foreclosure or redemption, accounts of the amount of mortgage debt due, including, when the mortgagee has taken possession, accounts of the rents and profits received by him, are an essential preliminary to the relief ultimately granted. So, in reference to the concurrent jurisdiction, there is hardly any head of equity in which it may not occasionally be necessary to take accounts.

But my concern this evening is with that portion of the concurrent jurisdiction of the court which rests upon "*account*" simply.

In my brief general review of the "concurrent jurisdiction," while mentioning and explaining generally the nature of the various heads of equity falling within that division, I reserved "*account*" for consideration in this lecture. There was more in that reservation than might have been suspected. In postponing "*account*," I postponed that head of equity in which, more than in any other, we seek in vain for a well-defined boundary between the *concurrent* and the *auxiliary* jurisdiction.

Consider generally how the matter stands in reference to definition of jurisdiction under the three great divisions: viz., the *exclusive*, the *concurrent*, and the *auxiliary*. There is ordinarily not much difficulty in determining whether a particular case is one falling within a head of *exclusive* jurisdiction. Trust, mortgage, administration of estates of testators and intestates, are heads of equity whose features are not easily

mistaken. So the particular heads of *concurrent* jurisdiction explained in my fifth lecture, viz., Fraud, Accident, Mistake, Partnership, Specific Performance, Dower, and Partition, are definable with tolerable accuracy.

As respects the third division, the *auxiliary*, that, if you recollect, was in my sixth lecture subdivided into two classes, the first that in which the operations of the court were strictly *ancillary*, such as discovery and perpetuation of testimony; and the second, that in which the court exercised a *controlling* and *superintending* rather than an *ancillary* jurisdiction, as in bills of peace and bills to establish wills.

Now, the jurisdiction of the equity courts in cases of the latter class, may, I think, be said to have been defined with sufficient distinctness by the description given of it; and, as respects the former class, where the jurisdiction is merely *ancillary*, no attempt at definition will be requisite. For, if a case be one neither calling for the *auxiliary* jurisdiction of the court in the superintending or controlling sense, nor falling within any head of *exclusive* or *concurrent* jurisdiction, then necessarily the general remedy lies at law only, and the interference of equity can be invoked merely as that of a handmaid.

Summing up, then—

1. We have defined the exclusive jurisdiction.
2. We have defined the concurrent jurisdiction, except *account*.
3. We have defined the latter class of auxiliary jurisdiction, viz., the controlling or superintending; and

the former class, viz., the ancillary, if our definition be otherwise completed, needs none.

Consequently, if we can define the limits of the equitable jurisdiction in matters of "*account*," our task will have been substantially completed.

But some of you may ask, Of what *practical* importance is the completion of this task? Assuming the existence of a right to sue at law, what matters it to the injured party whether he have or not a cumulative remedy in the equity court? My answer is, it matters in two ways—

1. In reference to *discovery*.

2. In so far as the head "*account*" is concerned, in reference to *the machinery for taking accounts*.

And, first, in reference to *discovery*. Previously to the existence of the powers of discovery recently conferred on the common law tribunals, it was of the utmost importance where an injured party required a discovery from his opponent that he should, if possible, bring his case within some head of equity, so that he might sue in Chancery rather than at law; for, if his remedy were at law only, he was still obliged to appeal to the ancillary jurisdiction of the equity court, and file his bill for discovery: and this, as I pointed out in my sixth lecture, he could do only at his own expense (a).

Again, the answer to the bill of discovery was in the common law court viewed strictly and technically as an admission; and, therefore, if the party seeking dis-

(a) Page 119, *supra*.

covery required to use any portion of his opponent's answer in support of his own case, or in disproof of his opponent's, he was compelled to put the whole in evidence. He was not allowed to use the answer as an admission of any fact, however simple and disconnected from the other statements in it, without making the whole answer evidence. The party answering was thus, so to speak, enabled to give evidence in his own favour.

In the equity tribunals, on the other hand, in the case of a bill *for relief* as well as discovery, the more rational system prevailed, and still prevails, of allowing the plaintiff to read any selected portions of the answer as admissions, provided only nothing was or is excluded fairly qualifying or bearing upon the particular portions of the answer read (a).

Whether then we consider the terms in reference to costs upon which alone discovery was obtainable in

(a) Singularly enough, until the year 1841 the rule in equity, in reference to reading the answer to a cross bill for discovery only, was the same as at law, *i.e.*, the whole must be read if any part was. (See *Lady Ormond v. Hutchinson*, 13 Vesey, 47; and 16 Vesey, 94.) However, by the 42nd Order of the 26th August, 1841 (subsequently Consol. Order xix. rule 6), answers to bills of discovery were put on the same footing in equity as those to bills for relief.

Now, by the Rules of the Supreme Court, 1875, Order xxxi. rule 23, "Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others. Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

aid of an action or defence at law, or those upon which the discovery itself might be used after it had been obtained, the advantage of a resort to the *concurrent* instead of to the *auxiliary* jurisdiction of the court equally appears ; and I may observe that the practice under the new jurisdiction, enabling courts of law to compel discovery, while equalizing in other respects the advantages of suing at law and in equity, still leaves untouched the rule of evidence just commented on. At law, if you read any part of an opponent's affidavit in answer to interrogatories filed under the new practice, you must read the whole.

But, secondly, I intimated that the definition of the limits of the concurrent equitable jurisdiction in matters of account was of practical importance, in consequence of the difference existing at law and in equity as respects the "*machinery for taking accounts.*" The state of the case is as follows :—

In equity, accounts are taken by the court itself, or by its judicial officers. At law, as you will presently learn from the short outline of legal remedies which I am about to attempt, actions involving matters of account commonly result in arbitrations, and the accounts are thus commonly taken by an arbitrator ; that is to say, a judge selected by the parties litigant, who have at their own expense to provide their judge's salary and a court for him to sit in (a).

(a) The Judicature Act, 1873, by sect. 83, provided for the appointment of permanent officers of the Supreme Court, to be called official referees, who are salaried officers ; and the Act, by sect. 56, empowers a Court or judge before whom a cause or matter is pending to refer any question arising thereon for inquiry and report to any official or special

Having thus pointed out the practical importance of defining the true limits of the equity jurisdiction in "*account*," I propose, as a preliminary to the more immediate task of definition, giving a short outline of the general history of the remedies afforded at law in matters of account.

At common law a writ of "*account*" lay against two classes of persons, viz. :—

1. Against those standing in a situation (not amounting exactly to trusteeship), but of a quasi fiduciary kind recognised by law, as bailiffs, receivers, or guardians in socage.

2. By merchant against merchant.

In this action there were three stages. The first, that in which it was decided whether the defendant should account or not ; and if decided in the affirmative, the judgment was, that the defendant do account *quod computet*: this stage answered to the original

referee, whose report may be adopted wholly or partially ; and, by section 57, authorises the Court or a judge, in case of consent, or without consent where the cause or matter requires prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made before a jury, or conducted by the Court through its other ordinary officers, to order any question or issue of fact, or any question of account, to be tried either before an official referee or a special referee to be agreed on between the parties. And, by section 59, the powers of the Common Law Procedure Act, 1854, in respect to arbitration, are made applicable to proceedings before referees.

It has been decided that these statutory provisions do not warrant an order directing that the whole cause or matter be tried by a referee (see *Longman v. East*, 3 C. P. D. 142) ; and in consequence the old arbitration procedure is, by consent, still largely resorted to. Where there is a reference to a referee, the litigants generally prefer a special referee of their own selection to an official referee.

hearing in equity. The second stage at law was the actual taking of the account, which was there done before auditors appointed by the court: this corresponded to the taking of the account in the Master's Office, or, as under the new equity practice, by the chief clerk. The third stage at law was the judgment for the amount found due, analogous to the order on further directions or further consideration. But though the analogy between the two procedures was so close, the jurisdiction at law by action of account languished and ultimately fell into desuetude, while that in equity by bill flourished and became firmly rooted.

These very different results may be ascribed to two causes: namely, first, the limited applicability of the action, and its consequent *absorption*, if I may be allowed the expression, into the arbitration system; and, secondly, the imperfect powers of compelling discovery possessed by the common law courts.

And first, as respects the limited range of the action of account.

We have already seen that either a *quasi* fiduciary relation between the parties, or that of merchant towards merchant, was necessary to found the action. Flowing from this notion of the necessity of a fiduciary relation, we find that at common law the action lay neither *in favour* of the personal representatives of the person claiming the account, nor *against* the personal representatives of the accounting party. The 13th Edward I., cap. 23, however, remedied the former of these defects, and the 4th Anne, cap. 16, s. 27, the

latter: which last enactment also gave an action of account to one joint-tenant or tenant in common against a co-tenant who should receive more than his own share of the rents and profits (a).

But it was then too late to infuse any substantial vigour into the declining action. It had already been supplanted at law by a rival which has since attained vast growth—I mean, “arbitration.”

The practice of reference to arbitration appears to have formed part of the common law system from a very early date. If you turn to Rolle’s Abridgment, under the head of “Arbitrament,” a very cursory inspection will satisfy you on this point. You will find there and in the Year Books numerous questions discussed in reference to awards during the reigns of the 3rd and 4th Edwards, and of the intermediate Henrys. Some of them exhibit in a somewhat quaint form the workings of an already highly technical system. Thus it was considered that an award, to be good, must possess a certain quality of mutuality, and that the act awarded to be done must appear to be for the satisfaction of one party and in discharge of the other. Hence, in a case of the 9th Edward IV., in the Year Book, Choke J. says, by way of illustration, with some apparent want of gallantry: “If a man and a woman submit to arbitration, and the arbitrator do award that they shall intermarry, this shall be intended to be no advantage, &c.” But perhaps he had present to his mind an imaginary case of an action

(a) See note (a), p. 98, supra.

for breach of promise by the lady, in which case his respect for the sex would be saved whole.

But, further, and this is more to our immediate purpose, the Year Books disclose symptoms of incipient encroachment on the action of account by arbitration at so early a date as the reign of Henry V. Thus, in Rolle at Arbitrement R. we have: “Un action d’accompt poet estre submit al agard et l’arbitrators poient faire un agard de ceo, car ceo est uncerten” (a).

Passing on at a stride some three hundred years, there can be little doubt that one of the most important branches (if not the most important branch) of arbitration business at the early part of the eighteenth century was the adjustment of accounts. This may be collected from the well-known Act of William the Third’s reign, which still forms the foundation of the arbitration system (b).

That Act, after a short preamble pointing out the advantages of references to arbitration by rule of court, continues thus: “Now for promoting *trade* and rendering the awards of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders or others concerning matters of *account* or trade, or other matters, &c. ;” and then the Act proceeds with its enactments, which it is not material for me to notice. My concern is with the preamble, the inference from which is, I think, pretty strong, that at the date of the

(a) 2 Henry V. 2.

(b) 9 & 10 Will. III. cap. 15.

Act *arbitration* had begun to take the place of the action of account; and when we consider that the latter action with its procedure before auditors was limited in its operation, while “arbitration” was available wherever an ordinary action at law lay, it seems to be a natural result that the procedure of larger application should gradually become more and more understood, and should supersede that of more limited use. In fact, the question being, Should an ordinary action at law be brought with a view to proceeding by arbitration, or should an action of account be brought which would be prosecuted before auditors? the answer was in favour of the course calculated to result in the better understood of the two procedures. Finally, the procedure before the auditors was subject to the special disadvantage that a vast number of separate issues respecting the payment or receipt of any particular “items” of account might be raised by either party, who might claim as of right to have them determined by a jury; a course which, when pursued, must necessarily have led to great expense and delay; and this circumstance would naturally cause a preference to be given to arbitration (a).

But, secondly, we may regard as one of the causes of the decline of the action of account the imperfect powers of compelling discovery possessed by a court of law as contrasted with a court of Equity. This indeed appears to have been considered by Mr. Justice

(a) Lord Hardwicke, indeed, attributed to this cause the decline of the action of account; see *Ex parte Bax*, 2 Vesey Sen. 388.

Blackstone to have been the sole cause of the decline. He says:—"But, however, it is found by experience "that the most ready and effectual way to settle these "matters of account is by bill in a court of equity, "where a discovery may be had on the defendant's "oath, without relying merely on the evidence which "the plaintiff may be able to produce" (a). This statement might be accepted as correct if we were able to show you, as we proceed further in our lecture, a perfect jurisdiction in equity in all matters falling within the scope of the old action of account. But the truer view is, I think, that arbitration and equity divided between them the old common law jurisdiction in "account:" and in reference to the imperfect powers of discovery alluded to by Mr. Justice Blackstone, it must be borne in mind that the imperfection was partially (b) remedied by the section of the 4th Anne, cap. 16, before referred to, which, in its efforts to revive the drooping jurisdiction, conferred on the "auditors" in the action of account power to administer an oath and examine the parties touching the matters in question.

In connexion with this question of the imperfect powers of the common law courts to compel discovery, let me recommend you to look at one of the ordinary forms of reference to arbitration appended to *Russell*

(a) Bl. Com. vol. iii. p. 164.

(b) See *Wheeler v. Horne*, Willes, 208, in which case an opinion is distinctly expressed that these powers of the auditors exist only when the action is brought under the Act. The results would be singularly anomalous. The auditors would have power to examine the executors of a bailiff, but not the bailiff himself.

on Arbitrations, or *Watson on Awards*. There you find the arbitrators invested with authority to examine the parties and to call for the production of papers, in fact to exercise those powers which give to the jurisdiction in equity its peculiar value. The common law arbitration system is, indeed, a happy instance of engrafting a scion of equity practice on the stock of common law jurisdiction; and much has been done by the Legislature in aid of the efforts of those engaged in the practical working of the law (*a*). The infirmity of the arbitration system lies in the circumstance already adverted to—that the fees to the arbitrator, and frequently the expense of the place in which his sittings are held, fall upon the litigant parties. They pay, as I said, for their own judge, and provide their own court.

And now I reach, at last, the particular object of my lecture, viz., the equity jurisdiction in account. To allot nearly one-half of a lecture to mere introduction seems out of due proportion; but my task is to convey accurate elementary knowledge, and this cannot be done without exhibiting side by side the workings of those two great systems, *law* and *equity*, which together constitute our jurisprudence.

Well, then, what jurisdiction has equity in matters of “account?” that is to say,—neglecting all those heads of exclusive or concurrent jurisdiction where account is an adjunct more or less frequent, in what

(*a*) See 3 & 4 Will. IV. cap. 42, ss. 39, 40, 41; 17 & 18 Vict. cap. 125, ss. 3 to 17.

cases may a bill in equity be filed merely to obtain an account? (a)

This brings me at once to the consideration of a ground or supposed ground of equity jurisdiction frequently referred to both in the Reports and by the text writers. The most concise statement of the principle is that of Lord Nottingham in the case of *Parker v. Dee* (b), frequently referred to, and adopted verbatim by Mr. Ballow in the treatise on equity commonly quoted as "*Fonblanque on Equity*." In that case the defendant's counsel urging that the suit in equity ought to be dismissed, because the plaintiff had obtained a discovery and might go on at law, his lordship said:—"As for dismissal to law because the plaintiff hath discovery here, when this court can determine the matter, that shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

It is obvious that if the principle here laid down had been carried out to the full, the ancillary jurisdiction of the court could never have existed. Every plaintiff requiring discovery would have said, "I am obliged to come for discovery; give me relief also;"

(a) There is a remarkable order of Lord Ellesmere, 11th October, 1614, which shows that at that date the Chancery jurisdiction in "account" was discountenanced upon the very ground to which Sir William Blackstone attributes the growth of the jurisdiction, viz., the power of discovery upon oath. It is as follows:—"Marchants' accompts and such like are not to be examined in the Chancery, for none is to accompt upon oath but to the king onely. Yet frawd and covyn is to be examined and punished."—Sanders' Orders in Chancery, vol. i. p. 86.

(b) 2 Chancery Cases, 201.

and the court must have answered, "We will do so." The equity jurisdiction would then practically have been unbounded, for it is hard to suppose a case in which some facts requiring proof by the plaintiff in equity would not be within the knowledge of the defendant, and the extent to which discovery was actually needed by the plaintiff could hardly have been brought to any accurate test. The principle thus largely stated would have applied equally to an action of assumpsit for not accepting goods, as to a case of intricate and complicated accounts.

It may seem needless to say that no principle capable of such general application exists; yet even so recently as the time of Sir Thomas Plumer we find that learned judge adverting to the supposed principle in language almost as general as that of Lord Nottingham. Thus, in the case of *Ryle v. Haggie* (a) his Honour says: "When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief."

The rational course, if I might without presumption express an opinion, would, as it seems to me, have been for the equity court to have assumed concurrent jurisdiction in all those cases where a plaintiff came alleging his need of discovery, and where, having regard to the *nature of the case*, trial by an equity judge afforded a convenient mode of determination; and to have limited itself to the office of handmaid

(a) 1 Jacob & Walker, 234, see 237.

whenever trial by jury and *vivâ voce* examination in open court seemed desirable.

No such general intelligible rule of jurisdiction can, however, be traced. The nearest approach ever made to any general statement has been, that "in most cases of fraud, accident, mistake, and account, where discovery was needed, the court would not turn the plaintiff in equity back to law, but would give relief as well as discovery;" and as Mr. Fonblanque, in one of his notes (a) to the "Treatise on Equity," has stated his inability to strike out the distinguishing principle upon which courts of equity have proceeded in assuming or declining entire jurisdiction in cases where discovery was needed, I may well be excused the attempt.

Relinquishing, then, all endeavour to define by means of general principle the cases in which equity assumes jurisdiction in matters of account, I will attempt to classify the results of the actual decisions on this head. They appear to be as follows:—

1.—Equity will assume jurisdiction in favour of a principal against his agent, though not in favour of the agent against the principal.

2.—Equity will assume jurisdiction where there are mutual accounts between the plaintiff and defendant.

3.—It will do so where there are circumstances of special complication.

First then—A bill for an account will lie in equity,

(a) Book VI. ch. iii. s. 6, note (r).

by a principal against his agent. This proposition was first distinctly laid down by Sir John Leach, to whose short, terse judgments we owe many bold enunciations of principle, of which not a few have held their ground. I refer now to the case of *MacKenzie v. Johnston* (a). In that case the plaintiff had agreed with Johnston and Meaburn, owners of a vessel, to ship earthenware to Bombay, to be sold there on their account, and the shipment had been made. The bill was against Johnston and Meaburn for an account: they demurred. The Vice-Chancellor's judgment is as follows:—"The defendants here were agents for " the sale of the property of the plaintiff, and wherever " such a relation exists a bill will lie for an account; " the plaintiff can only learn from the discovery of the " defendants how they have acted in the execution of " their agency, and it would be most unreasonable " that he should pay them for that discovery if it " turned out they had abused his confidence; yet " such must be the case, if a bill for relief will not " lie."

In this pithy judgment we find, you will observe, not merely the broad enunciation of the rule, but also distinct indications of the grounds on which it stands. The facts are, in general, exclusively within the knowledge of the agent; the principal therefore usually requires discovery, and if a bill for relief did not lie,

(a) 4 Maddock, 373. So a suit for an account lay as of course by a landowner against the agent and manager of his estates, without any allegation of fraud or special circumstances; *Makepeace v. Rogers*, 4 De Gex, Jones & Smith, 649.

he could obtain discovery only at his own expense. You should note further the single word "confidence," referring to the fiduciary relation between the parties, which forms a distinct ground for supporting the jurisdiction in equity. Sir John Leach's proposition must, I consider, be viewed as sound law in all its breadth (a).

Some difficulty, no doubt, occurs occasionally in determining whether the particular relation of principal and agent does exist between two parties. One of the best illustrations of this will be found in the conflicting opinions which long obscured the relation between banker and customer, and in the litigation which resulted in the final settlement of the law on that point; and, as the general importance of the question makes it doubly interesting, I will briefly review its history.

There can be little doubt that the popular notion for a long time was, perhaps still is, that the banker stood towards his customer in the position of a kind of trustee or agent. People talk indeed even now of having so much money in Coutts's or at Hoare's, with a kind of belief that the banking firm holds the money as a depository only. But, further, the true view on

(a) According to the later decisions this was not so. The fiduciary relation was as indicated in the judgment of Lord Justice Turner in *Padwick v. Stanley*, *vide* extract given at p. 207, *infra*, the true ground of jurisdiction; see *Hemings v. Pugh*, 4 Giffard, 456; *Barry v. Stevens*, 31 Beavan, 258, and the judgment of Lord Hatherley in *Moxon v. Bright*, L. R. 4 Ch. App. 292, where his lordship ruled that the mere existence of the relation of principal and agent was not sufficient to sustain a bill by the former for an account unless the agent held a fiduciary position.

this point has only been settled amongst lawyers within the last twelve years. Thus, in the case of *Bowles v. Orr* (a), Lord Abinger, C.B., in 1835, thus expresses himself: "It appears to me that a customer
" who trusts his banker with a fund, is justly entitled
" to call on his banker for an account of it, and that
" the banker by receiving it becomes his agent, and
" accountable to him for it."

You find in these words both the expression of the popular view that the banker was an *agent*, and also a reference to the consequence which would have followed had that view been correct, viz., that a bill for an account would have lain in equity; however, in the case of *Foley v. Hill*, which cause came first before the late Vice-Chancellor of England, then before Lord Lyndhurst on appeal, and ultimately before the House of Lords, the relation between banker and customer was decided to be that of debtor and creditor merely, and a bill for an account by the latter against the former was dismissed.

In the first instance the Vice-Chancellor of England, when the case came before him, decreed an account. Lord Lyndhurst, on appeal (b), dismissed the bill, using in the course of his judgment the following words: "It is quite clear that a banker is not to be
" considered a trustee for his customer in the legal
" sense of the term. Money advanced by a customer
" to a banker is a loan, and constitutes a debt." Upon

(a) 1 Younge & Collyer's Exchequer R. 474.

(b) See 1 Phillips, 399.

appeal to the House of Lords (*a*), Lord Lyndhurst's views were affirmed by Lord Cottenham, Chancellor, Lord Brougham, and Lord Campbell; and, the fiduciary relation failing, the bill for an account, notwithstanding an attempt to sustain it on the distinct ground of complication, apart from the fiduciary relation, failed also.

Next, although a principal may file a bill against his agent, it is clear that an agent cannot do so against his principal. The decisions are distinct on this point (*b*), and the absence of reciprocity in this respect is, having regard to the grounds for the jurisdiction in favour of the principal against the agent, as indicated by Sir John Leach, consistent with sound principle. For, first, the agent has commonly all the knowledge requisite to support his rights, and requires no discovery; and, secondly, the agent reposes no special confidence in the principal.

The present Lord Justice Turner, in a case which came before him when Vice-Chancellor (*c*), expressed himself on the question of reciprocity as follows: "It

(*a*) See 2 House of Lords Cases, 28, also *Pott v. Clegg*, 16 Meeson & Welsby, 321; *Jackson v. Ogg*, Johnson, 397.

(*b*) *Allison v. Herring*, 9 Simons, 583; *Padwick v. Stanley*, 9 Hare, 627.—See, also, *Smith v. Leveaux*, 1 Hemming & Miller, 123; s. c. on appeal, 33 Law Journal (N.S.) Chanc. 167, 2 De Gex, Jones & Smith 1, in which the general rule was treated as settled, Lord Hatherley, then V.C. Wood, holding, however (though his decision in this respect was reversed by the Lords Justices on appeal), that an exception ought to be made in a case where there had been receipts by the principal, of the particulars whereof the agent was ignorant, and on which a commission was payable to the latter.

(*c*) *Padwick v. Stanley*, 9 Hare, 627.

“ was then said that this was a case of principal and
“ agent; and that if the principal may file a bill
“ against his agent, the agent may file a bill against
“ his principal; but I cannot admit that the rights of
“ principal and agent are correlative. The right of
“ the principal rests upon the trust and confidence
“ reposed in the agent; but the agent reposes no such
“ confidence in the principal.”

But whatever the grounds, the result is certain. A bill does lie by principal against agent, but not by agent against principal, for an account.

Secondly—Equity will assume jurisdiction where there are mutual accounts between the plaintiff and defendant. Perhaps I ought to have said that the *better opinion seems to be to this effect*; for in reference to this, as indeed in reference to other questions arising upon the equity jurisdiction in matters of account, the authorities are mainly agreed on one point only, viz., the extreme difficulty of defining the jurisdiction.

The nearest approach to a systematic definition of the equity jurisdiction in cases of mutual account is that contained in the judgment of Lord Justice (then Vice-Chancellor) Turner, in the case of *Phillips v. Phillips (a)*. His lordship in that case, in allowing a demurrer to a bill for an account, expressed himself as follows “ I have no doubt that this bill cannot be
“ maintained. I take the rule to be, that a bill of this
“ nature will only lie where it relates to that which is
“ the subject of a mutual account; and I understand

(a) 9 Hare, 471.

“ a mutual account to mean, not merely where one of
 “ two parties has received money and paid it on account
 “ of the other, but where each of two parties has
 “ received and paid on the other’s account. I take the
 “ reason of that distinction to be, that, in the case of
 “ proceedings at law, where each of two parties has
 “ received and paid on account of the other, what would
 “ be to be recovered would be the balance of the two
 “ accounts; and the party plaintiff would be required
 “ to prove, not merely that the other party had re-
 “ ceived money on his account, but also to enter into
 “ evidence of his own receipts and payments—a posi-
 “ tion of the case which, to say the least, would be
 “ difficult to be dealt with at law. Where one party
 “ has merely received and paid moneys on account of
 “ the other, it becomes a simple case. The party
 “ plaintiff has to prove that the moneys have been
 “ received, and the other party has to prove his pay-
 “ ments. The question is only as to the receipts on
 “ one side and the payments on the other, and it is a
 “ mere question of set-off; but it is otherwise where
 “ each party has received and paid.”

The rule here laid down is, I should have considered, reasonably clear and free from objection; but his Honour Vice-Chancellor Kindersley seems on a recent occasion to have placed a different construction upon the judgment of Lord Justice Turner from that which appears to me the obvious one, and indeed to have denied altogether the efficacy of mutuality of accounts as a ground for equity interposition. I allude to the case of *Fluker v. Taylor*. In his judgment in that

case, the Vice-Chancellor, though not expressly mentioning *Phillips v. Phillips*, evidently refers to that case in the following observations (a):

“ It is difficult to lay down any fixed rule which
“ goes to mark out the line between those cases
“ where an account must be taken in equity and
“ where it need not. An attempt has been made to
“ lay down such a rule by saying the accounts must
“ be mutual, that there must be receipts and payments
“ on both sides.

* * * * *

“ But it really appears to me that it would be dangerous
“ to lay down the rule in any such terms. For, take
“ the common case of any gentleman of fortune keeping
“ a mere money account, not a business account, with
“ his banker: he pays money to the banker and the
“ banker pays his cheques; that is mutual receipt and
“ payment; the banker receives money from the cus-
“ tomer and pays cheques to the customer; and the
“ customer pays money into the banker's and draws
“ money out. If the rule were as stated, such a case
“ would fall within it, while it is clear in such a case
“ no bill would lie (b). It is therefore dangerous to
“ say the equity depends on mutual receipts and pay-
“ ments; the equity must depend in each case on the
“ nature of the account; it depends on this, whether
“ the account is in its own nature, not merely from
“ the number of items but from its own nature, so

(a) See *Fluker v. Taylor*, 3 Drewry, 191.

(b) See p. 206, *supra*.

“ complicated that this court will say such an account cannot be taken in a court of law.”

Notwithstanding the great weight due to any observation falling from so careful a judge, it is difficult not to feel that the doubts here expressed by him are outweighed by the judgment of Lord Justice Turner, and by the distinct expression of opinion on the part of Lord Eldon in the leading case of *Dinwiddie v. Bailey* (a), who says, in speaking of the equity jurisdiction in account, “there must be mutual demands forming the ground;” and it may, I think, be safely laid down that whether Lord Justice Turner’s definition of “mutual accounts” ultimately prevail or not, “mutual accounts” will remain firmly fixed as a ground of equity jurisdiction in account (b).

Thirdly—Equity will assume jurisdiction where there are circumstances of special complication.

Here, again, both the decisions and dicta create a distressing uncertainty as to the nature and extent of complication requisite to found the equity jurisdiction. In the leading case of *O’Connor v. Spaight* (c). Lord Redesdale, in a passage of his judgment which is frequently quoted on this point, uses the following language: “The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *Nisi Prius* with

(a) 6 Vesey, 141.

(b) See the observations of Lord Chelmsford in *Scott v. Corporation of Liverpool*, 3 De Gex & Jones, 359.

(c) 1 Schoales & Lefroy, 305.

“ all necessary accuracy, and it could appear only from
 “ the result of the account that the rent was not due (a).
 “ This is a principle on which courts of equity constantly
 “ act by taking cognisance of matters which, though
 “ cognisable at law, are yet so involved with a complex
 “ account that it cannot properly be taken at law; and
 “ until the result of the account, the justice of the case
 “ cannot appear.”

Lord Redesdale's observations, if they could with safety be accepted as a correct representation of the doctrine of the court as to complication, would furnish a broad intelligible rule. In every case the question would simply be, Could the accounts be taken at *Nisi Prius*, or would the common law judge, either before trial under the special power conferred by the Procedure Act of 1854 (b), or by moral coercion upon the cause coming on at *Nisi Prius*, compel a reference to arbitration?

Nor are Lord Redesdale's views unsupported by other dicta. In the case of the *Taff Vale Railway Company v. Nixon* (c)—in which, as I shall presently endeavour to show, the special facts were such as

(a) The question upon which the fate of the litigation between the plaintiff and defendant hinged was, whether any rent was in fact due.

(b) 17 & 18 Vict. cap. 125, s. 3—See *Croskey v. European, &c., Shipping Company*, 1 *Johnson & Hemming*, 108, in which (while holding, in accordance with the well-established doctrines of the Court, that the new Common Law jurisdiction had not impaired the jurisdiction of the Court of Chancery) Lord Hatherley, then V.-C. Wood, intimated that the mere circumstances of a plaintiff at law giving notice of his intention to move for a reference to arbitration amounted to an admission that the Court of Equity was the proper jurisdiction.

(c) 1 House of Lords Cases, 111.

clearly to make the case a fitter one for equity than law—you will find, first, *Lord Cottenham* referring with approbation to the rule as laid down by Lord Redesdale, and then *Lord Campbell* expressing himself as follows :—

“I do not proceed merely upon the ground which
 “is stated in the case as having been taken by his
 “Honour the Vice-Chancellor; I proceed upon this
 “ground, that here is a complicated account that
 “could not by possibility be taken by a jury. The
 “facts of the case, as stated by my noble and learned
 “friend on the woolsack, very clearly show that it
 “would be a mere mockery to bring such an action
 “before a jury. What would be done if such an action
 “were brought at *Nisi Prius*? I know that within
 “five minutes from the opening of the case by the
 “leading counsel for the plaintiffs, the judge would
 “say, ‘If we sit here for a fortnight we cannot try
 “this sort of case; and, therefore, it is indispensably
 “necessary for the sake of justice—not to save us from
 “the trouble of trying the case, which we are perfectly
 “willing to take, but for the sake of justice—that
 “there should be a reference to an arbitrator who will
 “take accounts between the parties.’”

Lord Brougham again, following *Lord Campbell*, spoke thus: “My Lords, I rise only to mention a
 “circumstance which my noble and learned friend
 “reminds me of, that it was formerly so much a
 “matter of course, when cases of this sort came
 “before us at *Nisi Prius* upon the northern circuit,
 “to refer them to arbitration, that we invented a

“ phrase for it at consultation, the meaning of which
“ was, that it could not be tried, and that the lead-
“ ing counsel for the plaintiff would what is com-
“ monly called ‘open a reference.’ Now, the *course*
“ ought to be a bill in equity; that is clearly the best
“ remedy.”

But notwithstanding these strong observations, it would be dangerous to lay down that the mere circumstance that the case is clearly one for an arbitration would be sufficient to found the jurisdiction in equity. It is easy to conceive a case in which, owing not to any special complication, but merely to the large amount claimed and the great number of items—Lord Campbell’s observations point to a case of this sort—a reference to arbitration would be a matter of course; not in consequence of the inability of a jury to take the account, but because of the waste of time on the part of judge, counsel, and witnesses, wholly disproportioned to any resulting advantage. Now it certainly cannot be said that the jurisdiction of the Equity Court to entertain an account in cases of this sort is established. On the contrary, in the case of the *South-Eastern Railway Company v. Martin* (a), in which an action had been brought by surveyors and engineers against a railway company to recover the balance of an account containing some four hundred items of charge and discharge, Lord Cottenham himself, while refusing to stay the action by injunction,

(a) 2 Phillips, 758 (where the plaintiffs are incorrectly called the *North-Eastern Railway Company*), and 1 Hall & Twells, 69.

made the following remarks upon the *Taff Vale Railway Case*. He said: "The observations of two noble Lords in the House of Lords, in the case of the *Taff Vale Railway Company v. Nixon*" (his Lordship here evidently refers to Lord Campbell and Lord Brougham, forgetting, apparently, his own general approval of Lord Redesdale's views), "have been referred to as expressing opinions, that accounts ought to be decreed in all cases in which references would be pressed at *Nisi Prius*; I apprehend that those observations were not intended to intimate any such rule or opinion, but were intended only to exemplify the great difficulty in dealing with such cases at law."

Further, in the case of *Phillips v. Phillips*, already referred to, Lord Justice (then Vice-Chancellor) Turner expresses himself thus (a): "It is true that a case of mere receipts and payments may become so complicated, as Lord Cottenham said in the case of the *Taff Vale Railway Company*, that the account cannot be taken at law, and may properly become the subject of the jurisdiction of a court of equity. But when the account is on one side only, I think a strong case must be shown before this court will exercise its jurisdiction. If the door of this court be opened to every case in which accounts would not be taken in an action at law, but a court of law would send them to a reference, I do not know where there would remain any protection against

(a) 9 Hare, 473.

“ suits in equity to parties between whom any account
“ existed.”

On the whole, while regretting that the broad intelligible rule laid down by Lord Redesdale should not be clearly established, it is impossible to treat it as having attained the force of law.

What, then, to recur to our original proposition, is the nature and extent of *complication* requisite to found the equity jurisdiction? The question can only be answered vaguely and imperfectly by instances. There can, I consider, be no doubt that where there are complicated questions of account between A, B, and C, three parties having distinct interests—where, in fact, the case approaches what might be called, in the language of a late nautical novelist, a triangular duel—a court of equity will interfere. The *Taff Vale Railway Case*, before alluded to as having elicited from Lord Cottenham, Lord Campbell, and Lord Brougham a general approbation of Lord Redesdale’s views, was one of this class, and needed no such broad general principle as that of Lord Redesdale to warrant the decision of the House. There, Nixon, a railway contractor, contracted with the *Taff Vale Railway Company* to execute certain works. Subsequently he entered into an agreement with Storm, another contractor, to supply him with funds to enable him to fulfil his contract. Later still, Nixon and Storm jointly entered into a new contract with the Company, and then Storm became bankrupt. Various complications arose in reference to the respective rights of Nixon and of Storm’s assignees; and it was held that under these

circumstances a bill would lie by Nixon against the Railway Company.

The case of the *South-Eastern Railway Company v. Brogden (a)*, the facts of which are too complicated to admit of my now laying them before you, will show you what particular circumstances were, and what were not, considered by *Lord Truro* sufficient to warrant the interposition of equity in matters of account; and his lordship's judgment in that case is particularly valuable, as pointing out and dwelling upon the importance of the distinction between a court of equity assuming a jurisdiction in matters of account, and its interfering by injunction to withdraw a matter in which an action has been commenced from the legal jurisdiction. You will do well to classify carefully, with reference to this distinction, the authorities which I have this evening mentioned. Thus, in *Mackenzie v. Johnston*, *Foley v. Hill*, *Allison v. Herring*, and *Padwick v. Stanley*, all referred to under the first ground of jurisdiction (*b*), the question simply was, Should equity give an account? So as respects *Phillips v. Phillips (c)*, under the second head. In *Fluker v. Taylor*, referred to under the second head (*d*), and in all the cases which I mentioned under the third head, except that of the *Taff Vale Railway*, the assistance of the court was invoked to stay proceedings at law.

There can, I think, be little doubt but that the

(a) 3 Macn. & Gor. 8—and see *Southampton Dock Co. v. Southampton Harbour & Pier Board*, L. R. 11 Eq. 254.

(b) See pp. 204, 206, 207, *supra*.

(c) See page 208, *supra*.

(d) See pp. 209, 210, *supra*.

distinction pointed out by *Lord Truro* will, in the course of the further development of our equity system, become a marked feature in that portion of it which relates to "*account*." The difference between affording to a suitor, who prefers coming into equity, the beneficial aid of the court, and interfering to withdraw a matter from law merely because the litigation there will probably result in a reference to arbitration, is immense. Nor should it be forgotten that since Lord Redesdale's observations in *O'Connor v. Spaight* were uttered, the powers and facilities of dealing with accounts at common law, by way of arbitration, have greatly increased (a); and though, according to the well-known rule (b), this circumstance cannot be viewed as having in the slightest degree diminished or affected the equity jurisdiction, it may well influence the judge where the question is not as to exercising jurisdiction in equity, but as to staying proceedings at law.

Finally, except as regards my first head of equity jurisdiction in account, that, namely, which is grounded on the relation of principal and agent, I find myself reluctantly compelled to say, in conclusion, that my observations of this evening must be viewed as beacons pointing out shoals and quicksands rather than as landmarks guiding you to safe havens.

It is now not quite ten years since (c), that Lord Cottenham, in the case of the *South-Eastern Railway Company v. Martin* (d), used the following words:—

(a) See p. 200, note (a), *supra*.

(b) See p. 125, *supra*.

(c) *i.e.*, from 1853.

(d) 2 Phillips, 758; see p. 762. The report at 1 Hall & Twells, p. 73, varies slightly.

“ The jurisdiction in matters of account is not
“ exercised, as it is in many other cases, to prevent
“ injustice which would arise from the exercise of a
“ purely legal right, or to enforce justice in cases in
“ which courts of law cannot afford it; but the juris-
“ diction is concurrent with that of the courts of law,
“ and is adopted because, in certain cases, it has better
“ means of ascertaining the rights of parties. It is
“ therefore impossible with precision to lay down rules,
“ or establish definitions, as to the cases in which it
“ may be proper for this Court to exercise this juris-
“ diction. The infinitely varied transactions of man-
“ kind would be found continually to baffle such rules,
“ and to escape from such definitions. It is therefore
“ necessary for this Court to reserve to itself a large
“ discretion, in the exercise of which due regard must
“ be had, not only to the nature of the case, but to the
“ conduct of the parties.”

I must confess, gentlemen, that I am unable to take so favourable a view as Lord Cottenham did of the uncertainty which exists respecting the equitable jurisdiction in *account*, an uncertainty which, to the best of my judgment, is both unnecessary and distressing. However, of one thing there is no doubt, the decisions of the last ten years have added little certainty to the doctrines of the Court. Our views still remain just as obscure; and in this obscurity—though cheered somewhat, I may perhaps venture to hope, by the faint glimmer of this evening’s lecture, I am compelled perforce to leave you (a).

(a) The Judicature Act, 1873, by section 34, assigns to the Chancery

Division of the High Court of Justice all causes and matters for, *inter alia* :

“The dissolution of partnerships, or the taking of partnership or *other* accounts.”

The effect of this provision must naturally be to attract to the Chancery Division, not only the cases formerly lying close to the border line which separated the Equity and Common Law Jurisdictions, but a large number of cases in which a bill in Equity would certainly not have lain when the jurisdictions were distinct.

LECTURE IX.

THE subject of this evening's lecture is "Injunction" in cases where the Court exercises an *auxiliary* "jurisdiction." This title, and the circumstance that this will be my last opportunity of addressing you on the subject of equity, alike suggest to me the propriety of a few words of explanation upon a point which might otherwise cause embarrassment to some of you,—I mean the want of *homogeneity*, if I may be allowed the phrase, in the terms used to denote the different heads of equity ranged under the three principal divisions of *exclusive*, *concurrent*, and *auxiliary*.

Most of you have probably heard of what in logic is called cross division. We may take any number of individual persons or things—let us assume the whole of mankind—and classify them, either *physiologically* into the Caucasian, Negro, Mongol, and other races; or *theologically*, into Christians, Mahommedans, Buddhists, and other religionists; or *politically*, into British, French, Prussians, &c. (a). So, as respects *equity* we may take the whole subject and divide it, either, as Mr. Smith does in his Manual of Equity, according to the nature of the relief afforded or of the function performed by the Court, into *Remedial Equity*, *Execu-*

(a) See Whately's Logic.

tive Equity, Adjustive Equity, Protective Equity, and Auxiliary Equity, or according to the plan which we have ourselves followed.

But whether we follow Mr. Smith's classification or our own, we find ourselves considerably embarrassed, as we proceed to the task of subdivision, by the circumstance that the terms which we are obliged to use to denote our different heads of subdivision bear no relation to our general plan of classification. Thus, *trust* and *mortgage* are words referring to the nature of the contract between the parties litigant; *fraud* refers to a course of conduct imputed by one party to the other; *partition* and *specific performance* to the remedy afforded by the Court; *discovery* to certain rules of equity pleading and practice adopted for eliciting truth: and thus the very terms used in describing the heads of equity into which our main divisions have been subdivided, naturally suggest a different classification from that which we are pursuing; in fact, a kind of cross-subdivision. Occasionally too it becomes necessary to use in a limited sense the term which has been selected to denote some particular head of equity; as we have done in the case of "Account" falling under the *concurrent*, and "Discovery" falling under the *auxiliary* jurisdiction.

Well, gentlemen, these very embarrassments and difficulties exist in regard to the use of the word "injunction" as denoting a head of equity. At first it might seem impossible to use the word for that purpose. For what is injunction? Merely that process of the Court of Chancery by which, where its aid is invoked,

it prohibits the doing of some act which is either unlawful or in the eye of the Court inequitable. It is a powerful engine of the Court, by which, in a large number of cases, it gives effect to the maxim before alluded to: "*Equity acts in personam*"—an engine equally available in the administration of every portion of its jurisprudence. Thus, in a case within the *exclusive* jurisdiction, say a case of trust, the Court will restrain the trustee by injunction from dealing improperly with the trust fund: and in a case within the *concurrent* jurisdiction, such as that of account in *O'Connor v. Spaight*, mentioned in my last lecture (a), the Court will occasionally enjoin proceedings at law. But just as in my general review of the auxiliary jurisdiction I took "discovery," which in its general acceptation includes all discovery, however obtainable, and treated of that particular kind of discovery only which concerned the division of jurisdiction then under consideration; so this evening I shall attempt to group together certain instances of the exercise of the process of injunction which appear to me to fall rather within the domain of the auxiliary jurisdiction of the Court than any other.

Now, in considering the subject of "*injunction*" generally, the cases in which the courts of equity interfere may be conveniently arranged into two classes, viz.:—

First, the cases in which equity interferes to restrain a person from instituting or continuing judicial proceedings in some other court; and,

(a) See p. 211, *supra*.

Secondly, cases in which equity interferes to restrain the commission of acts either unlawful or wrongful in the eye of a court of equity.

With the first class of cases we have no immediate concern this evening (a). In one particular instance only are injunctions of that class connected with the *auxiliary* jurisdiction of the court, namely, where a defendant at law files a bill of discovery in equity in aid of his defence, and obtains an injunction to restrain the proceedings at law until his bill is answered. Having regard, however, to the importance of this class of injunctions, both historically and as illustrating the principles of action of the court, some brief notice seems desirable.

In cases of this class, whenever a person by fraud, accident or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which in the eye of a court of equity must necessarily make the ordinary court an instrument of injustice, and it is therefore against conscience that he should use the advantage, the equity court, to prevent manifest wrong, will inter-

(a) By the operation of the Judicature Act, 1873, this first class has, so far as respects jurisdictions absorbed into and becoming part of the Supreme Court, ceased to exist, it being enacted, by section 24, sub-section (5), as follows: "No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto;" and having regard to sections 89 and 90 of the Act, proceedings for an injunction to restrain upon equitable grounds the prosecution of proceedings in an inferior Court must become rare.

pose by restraining the party whose conscience is thus bound from using the advantage he has improperly gained (*a*). Equity, in fact, says to the person who is proceeding contrary to equity: "Desist from your proceedings in the other court, or we will put you in prison" (*b*).

The jurisdiction of the court in decreeing injunctions to stay proceedings in other courts, may be traced back to a very early date. Thus, turning to our *repertorium* of antiquarian knowledge, the Calendars of Proceedings in Chancery, we find various instances of the exercise of this jurisdiction. In the reign of Edward IV. there is a case of *Astel v. Causton*, seeking to restrain an action in the Common Pleas upon certain bonds (*c*). In the reign of Richard III. there is a curious instance of a bill filed to restrain an action brought by a person whom the plaintiffs in equity allege to have been a *villein regardant* to the Manor of St. Giles Tydde, belonging to the Bishopric of Ely, and seeking an injunction, until certain evidences, which had been mislaid by reason of the flight of Morton Bishop of Ely beyond the realm, should be recovered (*d*).

It could hardly be expected that the assumption by the Court of Chancery of so large a jurisdiction, would be readily acquiesced in by other courts; and

(*a*) See Mitford's Pleading, p. 127, whence this statement is taken.

(*b*) A pecuniary penalty was commonly affixed in the order granting the injunction, but this was never enforced.

(*c*) Calendars of Proceedings in Chancery, vol. i. p. cviii.

(*d*) Edyall *v.* Hunston, *ib.* p. cxiii.

the Year-books of the time of Edward IV. afford abundant evidence of the struggle then going on between the common law judges and the Chancellor (*a*). The struggle was revived in Henry VIII.'s reign, continued through that of Elizabeth, and only determined in favour of the Court of Chancery in the time of James I., when the combatants for law and equity were respectively the great Lord Coke on one side, and Lord Chancellor Ellesmere on the other (*b*). Since that time, the jurisdiction has never been seriously doubted; and by a recent enactment in the Common Law Procedure Act of 1852 (*c*), the common law court itself is bound to stay proceedings on production of a writ of injunction awarded in equity (*d*).

(*a*) See the cases mentioned in Spence's *Equitable Jurisdiction*, vol. i. p. 674.

(*b*) Campbell's *Lives of Chancellors*, vol. ii. pp. 241-245.

(*c*) 15 & 16 Vict. cap. 76, s. 226. The material words of the section are that "in case any action, suit, or proceeding in any court of law or equity shall be commenced, sued, or prosecuted, in disobedience of or contrary to, any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster . . . in any other court than that by or in which such injunction may have been issued, or rule or order made . . . the said other court shall stay all further proceedings contrary to any such injunction, rule, or order." In a recent case, *Milburn v. The London and South-Western Railway Company*, L. R. 6 Exch. 4, the Court of Exchequer held the 226th section inapplicable where an injunction had been granted by the Court of Admiralty under a statutory enactment giving to that court the powers conferred on the Court of Chancery by the Merchant Shipping Act—a decision grounded, it is conceived, on a literal construction of the words *Superior Courts*, and contrary, it would seem, to the spirit and general intent of the enactments referred to.

(*d*) And where no writ had actually issued, the Court of law would stay proceedings after an order for an injunction had been made by the Court of Chancery; *Cobbett v. Ludlam*, 11 Exchequer R. 446.

The technical reasoning on which the right of the Court of Equity to interfere is rested, is probably familiar to most of you. The Equity Court, it is said, interferes in no way with the privileges or prerogatives of the other court; it merely acts on the person enjoined from suing. The other court has perfect power to proceed, though certainly, if the suitor moves a step, he is guilty of contempt towards the Equity Court, and is liable for the consequences.

It may be doubted whether this argument would be tolerated for a moment in any analogous case occurring in every-day life. Suppose, to put a very weak case by way of illustration, two professors, say of law and equity, at a university, both paid by salaries and teaching gratuitously; and imagine one of them advising his pupils not to attend his brother professor's lecture. Could it be contended for a moment, that this constituted no interference with the professorial functions of the other, merely because the inducement to absence assumed the shape of advice to the pupils? The case of the common law courts against equity was infinitely stronger; for the judges, at the period when the struggle took place, were paid by fees from the suitor, and the interference of equity came in the shape of *command*, and not of *advice* (a). The true justification

(a) The articles of impeachment against Wolsey complain both of his granting *injunctions* after judgment at law, and also of his personally commanding the judges with threats to defer their judgment. The twentieth article ran thus:—"Also the same Lord Cardinall hath examined divers and many matters in the Chancery after judgement thereof given at the Common Law, in subversion to your lawes, and made some persons restore againe to the other party condemned that,

for the interference is to be found, not in the technical "*modus operandi*," but in the substantially just and beneficial nature of the interference itself.

It is however important that the reasoning in support of the jurisdiction should be borne in mind, because the unlimited extent of the jurisdiction itself hinges thereon. The Court acts upon the person, and upon the person only: therefore, if the party accused of inequitable proceedings in some other court be within its reach, it will restrain his proceedings, whether that other court be a court of common law, or the Ecclesiastical Court (*a*), or the Court of Admiralty (*b*), or a Court of Scotland (*c*), or Ireland (*d*); and the principle obviously extends equally to proceedings in any foreign court (*e*).

But it is time that we should pass to the consideration of that class of injunction suits with which we are

"that they had in execution, by vertue of the judgement at the Common Law." And the twenty-sixth article thus: "Also, when matters have been near at judgement, by proces at your Common Law, the same Lord Cardinall hath not only given and sent injunctions to the parties, but also sent for your judges and expresly by threats commanding them to defer the judgement, to the evident subversion of your lawes, if the judges would so have ceased." See the articles, Coke, 4 Inst. cap. 8. It is instructive to notice how these two things—which, according to our present notions, were, the *first* clearly within his jurisdiction as Chancellor; and the *second*, a gross excess of it—appear to have been at that day equally regarded as grievances.

(*a*) *Hill v. Turner*, 1 Atkyns, 516.

(*b*) *Glascott v. Lang*, 3 Mylne & Craig, 451.

(*c*) *Jones v. Geddes*, 1 Phillips, 724; *Graham v. Maxwell*, 1 Macn. & Gor. 71.

(*d*) *Lord Portarlington v. Soulby*, 3 Mylne & Keen, 104.

(*e*) See Lord Brougham's observations at 3 Mylne & Keen, 107, upon the case of *Love v. Baker*, 2 Freeman, 125; s. c. 1 Chancery Cases, 67.

on the present occasion more immediately concerned, viz. those in which equity interferes to restrain the commission of acts either unlawful or wrongful in the eye of a court of equity. In cases of this class, "*injunction*" may be said to be the strong arm of preventive justice, whether in reference to *equitable* or to *legal rights*, though our present concern is with legal rights only.

In our common law system, as it stood previously to recent legislative enactment (a), preventive justice was practically unknown. A man might be on the point of committing the most flagrant legal wrong: your only course at law was to wait patiently and sue him for damages. It was not always so. So late as Lord Coke's time, preventive justice was a part of the common law system. That its importance was fully recognised by him appears from his observations in a passage in the second part of his Institutes, respecting the writ of "*Estrepement*," a common law process for preventing waste. Lord Coke says: "This was an excellent law, for *præstat cautela quam medela*, and preventing "justice excelleth punishing justice" (b).

And in the first Institute (c) we find the following enumeration of writs of a preventive character:—

"And note, that there be six writs in law, that may be maintained, *quia timet*, before any molestation, distresse, or impleading; as, 1, A man may have his writ of *mesne* (whereof Littleton here speaks) before he be distreyned. 2. A *warrantia cartæ*, before he be

(a) i.e., 17 & 18 Vict. cap. 125, ss. 79, 80, 81; see p. 253, post.

(b) 2nd Institute, 299.

(c) 100 a.

“impleaded. 3. A *monstraverunt* before any distresse
 “or vexation. 4. An *audita querela*, before any execu-
 “tion sued. 5. A *curia claudenda*, before any default
 “of inclosure. 6. A *ne injustè vexes*, before any dis-
 “tresse or molestation. And these be called *brevia*
 “*anticipantia*, writs of prevention.”

this is abolished
 by the Judicature
 Act: provide for
 lay execution on
 good grounds
 return.

But these writs, except that of *audita querela*, have long since fallen into desuetude; and the 36th section of the Statute of Limitations (a) includes amongst the forms of real action thereby abolished the writs of *mesne*, of *warrantia cartæ*, and of *ne injustè vexes*; so that these last have ceased to own even that slight shadowy legal existence which they formerly possessed.

But while the law had become thus helpless to anticipate and prevent wrong, the germ of preventive justice lay involved in the maxim, “Equity acts *in personam*,” ready for development as occasion might require; and as equity interfered by *injunction* to prevent the courts of law from being made the instruments of injustice, so it interfered by means of the same process to supply their want of power to afford preventive justice.

It is of the process of injunction, as granted by the equity courts in aid of the legal right—of injunction, I may say without much inaccuracy, as a head of *auxiliary jurisdiction* (b)—that I am now about to speak.

(a) 3 & 4 Will. IV. cap. 27.

(b) By the operation of Rolt’s Act, see note at page 240, *infra*, the jurisdiction of the Court of Chancery in the classes of cases discussed became in effect concurrent.

The injunction suits falling within this limited range are mainly of some one of the following classes :—

1. Patent cases.
2. Copyright cases.
3. Cases relating to Trade Marks.
4. Cases of Nuisance.
5. Cases of Waste.

1 and 2.—It will be convenient to consider *Patents* and *Copyright* together.

The history of *Patents* is intimately connected with that of the old abuse of Monopolies. Our earlier sovereigns arrogated to themselves the right of conferring upon particular individuals the sole and exclusive right of buying, selling, or making particular articles of sale or manufacture. This right was exercised so abusively, that by the end of Elizabeth's reign a large number of useful manufactures and trades had become exclusively monopolized by persons able to command court favour. However, in the case of Monopolies (*a*), decided in the last year of Elizabeth's reign, the judges held that a grant of the sole making of playing-cards within the realm, which was an ancient manufacture, was bad, as contrary to common law.

But, although monopolies affecting old manufactures were thus void, the king had always the power of

(*a*) 11 Reports, 85. The facts of the case aptly illustrate the practices and manners of the time. The grant was to *Edward Darcy*, a Groom of the Privy Chamber to Queen Elizabeth; and in justification of a privilege of *importing* playing-cards, also purported to be conferred, it contained a recital of the Queen's desire that her subjects should apply themselves to husbandry, and not make playing-cards; since by making such a multitude of playing-cards, card-playing had become more frequent, and especially amongst servants, and apprentices, and poor artificers.

granting monopolies of new inventions, as the chief guardian of the common weal, for the sake of the public good (a); and in the twenty-first year of James I.'s reign the rights of the sovereign and of the public were, by statutory enactment, placed on a footing not differing very much from that existing at common law.

By the statute in question (b), after declaring monopolies to be contrary to law, it was by the sixth section declared and enacted as follows:—

“Provided also, and be it declared and enacted,
“that any declaration before mentioned shall not
“extend to any letters patents and grants of privilege
“for the term of fourteen years or under, hereafter
“to be made of the sole working or making of any
“manner of new manufactures within this realm, to the
“true and first inventor and inventors of such manu-
“factures, which others, at the time of making such
“letters patents and grants, shall not use, so as also
“they be not contrary to the law, nor mischievous to
“the state, by raising prices of commodities at
“home, or hurt of trade, or generally inconvenient: the
“said fourteen years to be accounted from the date of
“the first letters patents or grant of such privilege
“hereafter to be made, but that the same shall be of
“such force as they should be if this Act had never
“been made, and of none other.”

This section of the Act of James, as amended and

(a) See Case of Monopolies.

(b) 21st Jac. I. cap. 3.

extended by subsequent enactments (a), still forms the basis of our present system.

Patent right is therefore a privilege derived from the original power of the Crown as restrained by statutory enactment.

Copyright, so far as respects the *origin* of the species of property called by that name, has long been the *crux* of lawyers, indeed one might say of the educated community at large. Much confusion has been caused by the word being used in two senses. It includes, or has been used to include, first, though somewhat inaccurately, the right of the author to publish or not, and to restrain others from publishing; and, secondly, the right after publication of republishing and restraining others from doing so. The first species of copyright, that existing before publication, according to the strong preponderance of authority, existed at common law. Whether the second species of copyright had any common law existence is the question about which the greatest lawyers have differed. In the great case of *Donaldson v. Beckett* (b), decided by the House of Lords in 1774, ten judges against one were of opinion that copyright existed at common law; though six to five were of opinion that whatever right of action an author might have had after publication, was taken away by the statute of Anne, the first Copyright Act (c)—in fact, that the author's claim was, since that statute, only under the statute.

(a) The 5 & 6 Will. IV. c. 83; 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69; and 15 & 16 Vict. c. 83, are the principal Acts applicable to patents.

(b) 4 Burrow, 2408.

(c) 8 Anne, cap. 19.

In the recent case of *Jeffereys v. Boosey* (a), also before the House of Lords, the question was incidentally reopened. Of the ten judges who were called to the assistance of the House on that occasion, three (b) expressed themselves to be of opinion that no copyright ever existed at common law, three (c), that it did exist, and four (d) declined expressing an opinion on the point. Of the three noble lords who moved the judgment of the House, the Lord Chancellor (Lord Cranworth) gave no opinion, while Lord Brougham and Lord St. Leonards both expressed themselves strongly of opinion that no copyright ever existed at common law.

But, passing by this question, however interesting, and omitting for the moment all notice of the common law right of the author before publication, let us consider the position and remedies *at law*, irrespectively of late enactment, both of the patent right owner and of the copyright owner, when their rights are invaded. An unscrupulous competitor infringes a patent, or pirates a book. What then? the only remedy was by an action, in which damages were recoverable; yet the wrong-doer might be a man of straw, and the verdict

(a) 4 House of Lords Cases, 815. In reference to the actual decision in *Jeffereys v. Boosey*, in which the privileges conferred by the statute of Anne were held to be confined to British subjects and to foreigners resident in the United Kingdom, and to the more liberal construction probably applicable to the 5 & 6 Vict. cap. 45, see *Routledge v. Low*, L. R. 1 Ch. App. 42; 3 H. L. 100.

(b) Parke, B.; Pollock, C.B.; and Jervis, C.J.C.P.

(c) Erle, J.; Wightman, J.; and Coleridge, J.

(d) Crompton, J.; Williams, J.; Maule, J.; and Alderson, B.

therefore valueless; or he might be perversely litigious, and prepared to renew the contest even at the expense of his purse; or the jury on the first occasion might give such moderate damages as to make a repetition of the offence a good pecuniary speculation—still the law remained helpless.

Under these circumstances, a bill in equity for an *injunction* afforded that protection which the law was unable to give.

But as the equity court acted in aid merely of the legal right, so in its course of action it always kept in sight the fact that its functions were really *auxiliary* only. The best exposition of the principles by which equity courts were guided in this class of cases is, so far as I am aware, that contained in Lord Cottenham's judgment in *Saunders v. Smith* (a), a case of copy-right:—

“ This court exercises its jurisdiction, not for the
 “ purpose of acting upon legal rights, but for the pur-
 “ pose of better enforcing legal rights, or preventing
 “ mischief until they have been ascertained. In all
 “ cases of injunctions in aid of legal rights—whether
 “ it be copyright, patent right, or some other descrip-
 “ tion of legal right, which comes before the court—
 “ the office of the court is consequent upon the legal
 “ right; and it generally happens that the only ques-

(a) 3 Mylne & Craig, 711, see p. 728.—The alterations in the practice of the Court of Chancery, resulting from legislative enactment, will be found noticed at p. 240, *infra*. The intermediate portion of this lecture is now useful to a student, only as conveying information respecting the former practice, a knowledge of which is essential to the understanding of the recent decisions.

“tion the court has to consider is, whether the case
“is so clear and so free from objection upon the
“grounds of equitable consideration, that the court
“ought to interfere by injunction, without a previous
“trial at law, or whether it ought to wait till the
“legal title has been established. That distinction
“depends upon a great variety of circumstances, and
“it is utterly impossible to lay down any general rule
“upon the subject by which the discretion of the
“court ought in all cases to be regulated.”

In a subsequent case (*a*), where the bill was one to restrain an alleged infringement of patent right, the same learned lord thus expressed himself:—

“The jurisdiction of this court is founded upon legal
“rights; the plaintiff coming into this court on the
“assumption that he has the legal right, and the court
“granting its assistance upon that ground. When a
“party applies for the aid of the court, the application
“for an injunction is made either during the progress
“of the suit, or at the hearing; and in both cases I
“apprehend great latitude and discretion are allowed
“to the court in dealing with the application. When
“the application is for an interlocutory injunction,
“several courses are open; the court may at once
“grant the injunction—*simpliciter*, without more—a
“course which, though perfectly competent to the
“court, is not very likely to be taken where the de-
“fendant raises a question as to the validity of the
“plaintiff’s title; or it may follow the more usual,

(*a*) *Bacon v. Jones*, 4 Mylne & Craig, 433, see p. 436.

“ and, as I apprehend, more wholesome practice in
 “ such a case, of either granting an injunction and at
 “ the same time directing the plaintiff to proceed to
 “ establish his legal title, or of requiring him first to
 “ establish his title at law, and suspending the grant
 “ of the injunction until the result of the legal inves-
 “ tigation has been ascertained, the defendant in the
 “ meantime keeping an account.”

Lord Cottenham here points out the three most common courses as being :—

1. Injunction simply.
2. Injunction with a direction that plaintiff proceed to establish his title at law (*a*).
3. Bill retained for a limited time in order that plaintiff may establish his title at law, the defendant keeping an account in the meantime (*b*).

As respects the second course, which implies the existence of some doubt on the part of the court respecting the legal title of the plaintiff, the practice at the present day would be to require an undertaking from the plaintiff to abide by any order the court might

(*a*) The equivalent under the modern practice, see note, p. 240, would be the granting of an interlocutory injunction upon special terms as to bringing the action to a speedy hearing. Another and common mode of dealing with cases in which the Court inclines to the view that the plaintiff is right, is to let the matter stand over until the hearing of the action, upon the defendant undertaking not to continue the acts complained of, or such of them as the Court thinks ought to be restrained, pending the trial of the question of right; see *Walker v. Brewster*, L. R. 5 Eq. 25, at p. 26.

(*b*) The modern equivalent to this course is simply a refusal of the injunction, reserving the costs of the motion until the trial of the action, the defendant undertaking to keep an account.

think fit to make as to damages, in the event of the plaintiff failing to establish his right at law (*a*).

As respects the third course, the allusion to the defendant keeping an account may demand a few words of explanation. Obviously, if the injunction be not granted, the defendant will continue the acts of alleged infringement or piracy; and should they in event prove to be either infractions of the plaintiff's patent right, or piracy of his copyright, the defendant ought to hand over to the plaintiff the fruits of his wrongful acts. It is with this view that the court, where the injunction is not granted, commonly requires the defendant to undertake to keep an account until the legal right is ascertained.

The decisions in regard to the course to be taken by the court with respect to withholding or granting the injunction, are extremely numerous; but, as intimated by Lord Cottenham in the case first cited, no general rule can be looked for. The substantial question always is, What course will, on the whole, be least likely to lead to wrong? Will the plaintiff be most likely to suffer wrong, if the injunction be *withheld*, or the defendant, if the injunction be *granted*? and in reference to the question whether the injunction shall be granted or withheld, the pecuniary ability of the defendant to answer any damages that may be awarded against him, is not without relevance (*b*).

(*a*) Or *now*, in the event of the plaintiff failing to obtain a judgment at the trial of the action.

(*b*) *Newall v. Wilson*, 2 De Gex, Macn. & Gor. 232.

Where the plaintiff's claim is in respect of a *patent*, two main questions are commonly raised, viz.: first, as to the validity of the plaintiff's patent; and, secondly, whether there has been an infringement. In reference to the first question, the length of enjoyment under the patent has always considerable weight with the court upon the point of withholding or granting the injunction. The practice of the court (with the grounds for it) was recently thus stated by Lord Justice Turner, when Vice-Chancellor: "When the
 " patent is new, the public, whose interests are
 " affected by the patent, have had no opportunity of
 " contesting the validity of the patentee's title, and
 " the court refuses to interfere until his right has
 " been established at law. But in a case where there
 " has been long enjoyment under the patent (the
 " enjoyment of course including use), the public have
 " had the opportunity of contesting the patent, and
 " the fact of their not having done so successfully
 " affords at least *prima facie* evidence that the title of
 " the patentee is good, and the court interferes before
 " the right is established at law" (a).

Where the plaintiff seeks the protection of equity in respect of *copyright*, the granting or withholding the injunction seldom turns in any degree on the question of enjoyment. Occasionally a dry question of law arises respecting the plaintiff's title to copyright (b),

(a) *Caldwell v. Vanvlissengen*, 9 Hare, 424.

(b) e.g. *Low v. Routledge*, 33 Law Journal Rep. (N.S.) Chanc. 717; on appeal, L. R. 1 Ch. App. 42; 4 H. L. 190.

but more frequently the material question is piracy or no piracy.

In reference to the question of the practice of the court in granting or withholding injunctions, I would call your attention to a section in the Chancery Procedure Act of 1852 (*a*), which, as it seems to me, ought to have led to considerable alteration in the practice, but which, so far as I am aware, has been little acted upon; I mean the 62nd. It is in these words:—

“In cases where, according to the present practice of the Court of Chancery, such court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said court may itself determine such title or right without requiring the parties to proceed at law to establish the same.” Of course you notice that the enactment is *permissive* merely; and, no doubt, in a considerable number of injunction cases, the issues raised between the parties are of a nature more fitted for trial before a jury than by a single judge; but certainly the new powers conferred by it on the court have not been very liberally exercised (*b*).

(*a*) 15 & 16 Vict. cap. 86.

(*b*) The permissive enactment above referred to was subsequently made compulsory in a more extended form, by the 25 & 26 Vict. c. 42, commonly known as Rolt's Act; which enacted that, whether the title to a relief or remedy were or were not dependent on a legal right, every question of law or fact cognizable in a Court of Common Law, on which the title to relief or remedy depended, should be determined by the Court of Equity. The Act contained three exceptions to its general operation. The first

Finally, let me observe, in reference to both *patent* and *copyright* cases, that although the jurisdiction exercised by the court is in aid of the legal title, and although in by far the larger proportion of cases the plaintiff in equity comes asserting a legal title, it is equally clear, both upon principle and authority (*a*), that a person having an equitable interest in a patent-right or copyright is entitled to have that interest protected. But obviously his equitable interest can stand on no higher ground than the legal title out of which it is derived; so that the court, in interfering in aid of an equitable title, where the legal title from which it flows is disputed, must be governed, in granting or withholding an injunction, by principles similar to those which prevail where the plaintiff comes upon a purely legal title.

reserving the right of the Court to direct an issue to be tried at the assizes, or in London or Middlesex. The second to the effect that where the object of the suit was to recover or defend the possession of land, relief should be given only in accordance with rules and practice of the Court before the Act. (See *Metropolitan Board of Works v. Sant*, L. R. 7 Eq. 197; *Slade v. Barlow*, L. R. 7 Eq. 296.) The third, exempting the Court from any obligation to grant relief where a Court of Law had concurrent jurisdiction if it should appear that the matter had been improperly brought into equity. By the effect of this Act in nearly all the cases discussed in the lecture the ultimate decision of the question of legal right was transferred from law to equity. There was at first some hesitation on the part of the Equity Judges as to removing from the consideration of a jury certain cases, such as those of nuisance, which were considered peculiarly fitted for determination by a jury (see *Eaden v. Firth*, 1 *Hemming & Miller*, 573), but the hesitation subsequently disappeared (see *Inchbald v. Robinson*, L. R. 4 Ch. App. 388, *Roskell v. Whitworth*, L. R. 5 Ch. App. 459), and the trial was commonly before the Court itself, and without a jury.

(*a*) *Mawman v. Tegg*, 2 *Russell*, 385.

And now a few words respecting that species of right, often, though somewhat inaccurately, referred to under the general term "*Copyright*," viz., the author's rights in regard to the productions of his own mind previously to publication.

It would be obviously monstrous to allow any person, who might either accidentally or surreptitiously have obtained a copy of the contents of another's writings, to publish those writings against his will.

But the author's rights do not stop here. Suppose the author himself to give a copy of his work to a friend, or to allow that friend to make a copy. The latter does not thereby acquire a right to publish the work. He must make no other use of his copy than the author may be fairly supposed to have intended him to make; and in the absence of direct evidence it will not be presumed a right of publication was intended to be conferred. This was the very point decided in the case of the *Duke of Queensbury v. Shebbear* (a), in which an injunction was granted, at the instance of Lord Clarendon's executors, to restrain the publication of the *History of the Rebellion* by a person who, with the permission of Henry, Earl of Clarendon, the son and administrator of the great historian, had made a copy of the original MSS.

Upon a similar principle it is held, that a person who writes and sends a letter to another does not convey to the latter an unqualified property, entitling him to publish it. The letter is addressed to him

(a) 2 Eden, 329.

that he may read it, and not that he may print and publish it.

Accordingly, in the leading case of *Pope v. Curl* (a), Lord Hardwicke restrained the defendant from publishing any letters written by Pope, though refusing to restrain the publication of letters written to him.

So in the more recent case of *Thompson v. Stanhope* (b) the widow of Lord Chesterfield's son was, at the suit of Lord Chesterfield's executors, restrained

(a) 2 Atkyns, 341.

(b) Ambler, 737. See, also, *Gee v. Pritchard*, 2 Swanston, 402. The student may with advantage refer to and distinguish the decisions which establish that if a person write and publish a work of fiction any other person has a right to dramatize it, and cause the drama to be acted (see *Reade v. Conquest*, 9 Common Bench N.S. 755), though not to print the drama and publish it; *Tinsley v. Lacy*, 1 Hemming & Miller, 747. And before the Dramatic Copyright Acts even a published drama might be adapted to representation, and put on the stage for profit, without the author's consent: *Murray v. Elliston*, 5 Barnewall & Alderson, 657. These decisions rest on the principle that the author's privilege under the General Copyright Acts is limited to the multiplication of copies, and that any one may make what use he pleases of a published work so long as he does not multiply copies. It was held by Lord Hatherley (when V.-C.) that if an author first publishes a play, and then turns the play into a novel containing the same incidents, his copyright in the play will be protected against piratical imitations, even though the piracy be from the novel, and not from the play; *Reade v. Lacy*, 1 Johnson & Hemming, 524. But where A. wrote and published a novel which he afterwards dramatized and assigned the drama to B., who never printed or published it, or represented it on the stage, and C., in ignorance of A.'s drama, also dramatized the novel and assigned the drama to D., who put it on the stage, it was held by the Court of Queen's Bench that A. having published his novel, any one might dramatize it, and that although the two dramas were founded upon the novel written by A., the representation on the stage of the drama written by C. was not a representation of the drama written by A., and consequently that B. could not recover penalties from D. under the 3 & 4 Will. IV. cap. 15; *Toole v. Young*, L. R. 9 Q. B. 523.

by Lord Apsley, Chancellor, from publishing Lord Chesterfield's letters to his deceased son, which had been allowed to remain in the widow's possession.

The same principle applies equally to an *oral* communication which is presumably made for a qualified purpose. Hence, in the case of the farce of "Love à la Mode," written by Macklin, it was held that the proprietors of a magazine had no right to employ a person to take down the words of the play and publish it (a). And similarly in more modern times, it was held, in the case of Mr. Abernethy's Lectures, that pupils attending lectures delivered orally, though entitled to take notes for their own use, have no right to publish the contents of those lectures (b).

Finally, whenever there has been any conduct partaking of breach of confidence, the court will go even further in protecting the rights of authorship before publication. Thus, in the celebrated case of her present Majesty's Etchings, where impressions had been obtained surreptitiously, the parties into whose hands the impressions had come were restrained, not only from exhibiting the impressions and publishing copies, but even from publishing a catalogue containing an enumeration and descriptive account of those etchings (c).

In reference to the whole of this class of cases of rights of authorship before publication, it is to be observed, that the author's rights very often rest partly upon equitable grounds, and that the question

(a) Macklin v. Richardson, Ambler, 694.

(b) Abernethy v. Hutchinson, 1 Hall & Twells, 28.

(c) Prince Albert v. Strange, 1 Hall & Twells, 1.

whether an injunction shall go or not is commonly decided by the court itself. In fine, there may be some doubt how far the jurisdiction by injunction exercised in this class of cases can be said to fall within the "*auxiliary*" jurisdiction of the court, though it would have been impossible, without risk of conveying incomplete notions, to have avoided a cursory notice of the authorities.

3. We now pass to *Trade Marks*.

Cases of bills filed by plaintiffs seeking to restrain the fraudulent imitation of *trade marks*, with a view of passing off goods not the plaintiff's as his, are of frequent occurrence. They must be taken to be clearly a branch of *auxiliary* equity.

There is, however, a distinction between these cases and copyright cases, which must be borne in mind. There is no *property* in a trade mark (a); the plaintiff does not come complaining that the defendant has infringed any right of property. The nature of his case is that the defendant has imitated his marks, for the purpose of fraudulently passing off his own goods as the plaintiff's (b). The distinction is not without importance, and it is especially well illustrated by the

*Take notice
See above
made this
statement and*

(a) This position cannot be maintained in its integrity since the judgments of Lord Westbury in the *Leather Cloth Company (Limited) v. American Leather Cloth Company (Limited)*, 4 De Gex, Jones, & Smith, 137 (affirmed on appeal in D. P., 11 House of Lords Cases, 523), and *Hall v. Barrows*, *Ibidem*, 150. In some respects the controversy (as to which see further *McAndrew v. Bassett*, 33 Law Journal (N.S.) Chanc. 561, and *Ainsworth v. Walmsley*, L. R. 1 Eq. 518) may be regarded as verbal rather than substantial.

(b) See the form of declaration at law, *Crawshay v. Thornton*, 4 Manning & Grainger, 357, and *Welch v. Knott*, 4 Kay & Johnson, 747. But

judgment—not less instructive because humorous—of Lord Justice Knight Bruce, in the case of *Burgess v. Burgess* (a).

In that case the plaintiff, Burgess, who was the father of the defendant, had for many years exclusively sold a particular sauce, well known as “*Burgess’s Essence of Anchovies*.” The defendant, the son, after acting for a long time as assistant to his father, at 107, Strand, the father’s place of business, set up in trade on his own account in the City, placing over his shop the words, “*late of 107, Strand*,” and there sold amongst other goods, a sauce which he called “*Burgess’s Essenc of Anchovies*.” On bill filed, Vice-Chancellor Kindersley restrained the defendant from continuing over his shop the words “*late of 107, Strand*” (b), but refused to restrain him from selling sauces under the name of

although the general nature of trade-mark cases he as stated in the text, fraud on the part of the defendant is not requisite to entitle the plaintiff to a decree in Equity protecting his exclusive right to a trade mark : *Millington v. Fox*, 3 Mylne & Craig, 338 ; *Burgess v. Hills*, 26 Beavan, 244. The result seems to be that while at law the *scienter* may be essential to enable the plaintiff to recover, such is not the case in Equity. See also *Dixon v. Fawcus*, 30 Law Journal (N.S.) Q. B. 137. See also, as illustrating the distinction between cases of *copyright* and of *trade marks*, *The Collins Company v. Brown*, 3 Kay & Johnson, 423, in which Lord Hatherley (then Vice-Chancellor Wood), decided that a foreign manufacturer has a remedy against a manufacturer here who fraudulently imitates his trade mark, whereas it was recently finally settled in the House of Lords, that a foreigner not resident here had, under the statute of Anne, no copyright in this country ; though there is authority for the view that a more liberal rule ought to prevail under the 5 & 6 Vict. c. 45 ; see *Routledge v. Low*, L. R. 3 H. L. 400.

(a) 3 De Gex, Macn. & Gor. 896.

(b) As to the rights of former managers or partners on setting up in business for themselves, see *Hookham v. Pottage*, L. R. 8 Ch. App. 91.

“*Burgess’s Essence of Anchovies.*” The plaintiff appealed; and on delivering judgment, Lord Justice Knight Bruce expressed himself as follows:—

“ All the Queen’s subjects have a right, if they will,
“ to manufacture and sell pickles and sauces, and not
“ the less that their fathers have done so before them.
“ All the Queen’s subjects have a right to sell these
“ articles in their own names, and not the less so that
“ they bear the same name as their fathers; nor is
“ there anything else that this defendant has done in
“ question before us. He follows the same trade as
“ that his father follows and has long followed, namely,
“ that of a manufacturer and seller of pickles, pre-
“ serves, and sauces; among them, one called ‘essence
“ of anchovies.’ He carries on business under his own
“ name, and sells his essence of anchovies as ‘Burgess’s
“ Essence of Anchovies,’ which in truth it is. If any
“ circumstance of fraud, now material, had accompanied,
“ and were continuing to accompany, the case, it would
“ stand very differently; but the whole case lies in
“ what I have stated. The whole ground of complaint
“ is the great celebrity which, during many years, has
“ been possessed by the elder Mr. Burgess’s essence
“ of anchovies. That does not give him such exclusive
“ right, such a monopoly, such a privilege, as to prevent
“ any man from making essence of anchovies and
“ selling it under his own name. Without therefore
“ questioning any one of the authorities cited, all of
“ which I assume to have been correctly decided, I
“ think that there is here no case for an injunction.”

In reference to this class of cases respecting *trade*

marks, the practice of the court in granting or refusing injunctions or retaining the bill is substantially the same as in patent or copyright cases. There is a right of action at law, though not in respect of wrong done to any species of property, but in respect of the fraudulent contrivance to pass off goods as and for the plaintiff's.

Accordingly, in a very recent case relating to labels printed in imitation of those commonly used by Johann Maria Farina, the celebrated maker of Eau de Cologne, Lord Cranworth, L.C., not being altogether satisfied that the injunction which had been granted by Vice-Chancellor Wood ought to have gone, retained the bill for a year, with liberty to the plaintiff to bring any action which he might be advised (*a*).

4. The fourth class mentioned as demanding the interposition of equity by injunction, was "cases of Nuisance." These are commonly subdivided into *public nuisance* and *private nuisance*.

The distinction is material in reference to the form of remedy. In cases of *public nuisance*, the remedy is at law by indictment, and in equity by information at the suit of the Attorney-General.

In those of *private nuisance*, at law by action on the case, and in equity by bill.

It is not always easy to determine whether certain particular acts are a public or merely a private nuisance. In the famous Clapham bell-ringing case (*b*), Vice-

(*a*) *Farina v. Silverlock*, 6 De Gex, Macn. & Gor. 214. See as to the later practice, note (*b*), p. 237, ante.

(*b*) *Soltan v. De Held*, 2 Simons (N.S.), 133.

Chancellor Kindersley thought that, to constitute a public nuisance, the thing done must be a damage or injury to all persons who came within the sphere of its operation, though of course it might be so in a greater degree to some than others, instancing noxious fumes from a factory, and stopping the king's highway. But the particular case before him, viz., of a peal of bells, which might be an intolerable nuisance to a person living close by, yet pleasurable to one living at a distance, could not be thought to constitute a public nuisance. The distinction, however, has become of minor importance so far as respects obtaining redress for private individuals, for the Vice-Chancellor ruled in the same case, that what is a public nuisance, may be also a private nuisance to a particular individual, by inflicting on him some special and particular damage; and that, in that event, the particular individual has his remedy in equity by bill, without making the Attorney-General a party (a).

In regard to cases whether of public or of private nuisance, both the grounds for the interference of equity, and the terms on which interference is granted, are substantially the same as in *patent* and *copyright* cases.

The remedy at law, in the case of public nuisance by indictment after indictment, and in the case of private nuisance by action after action, is wholly inadequate to answer the ends of justice; and accordingly the Court of Equity, while requiring the most

(a) *Soltau v. De Held*, 2 Simons (N.S.), 145—151. And an action lay at law; *Iveson v. Moore*, Holt's Rep. 16.

clear proof of the legal right, or else carefully providing for its establishment, lends its strong arm to law.

Perhaps one of the happiest illustrations of the beneficial interposition of equity to restrain acts which, if done, would have amounted to a public nuisance, is that afforded by the *Datchet Bridge Case* (a).

There, the bridge lying partly in Berkshire and partly in Buckinghamshire, the *medium filum* of the Thames being the county boundary, and the bridge requiring either repair or rebuilding, the magistrates of the respective counties were unable to agree upon any general plan. Bucks accordingly proceeded to repair its own side; but the difficulty was, how to deal with the centre bay of the bridge. The Bucks engineer ingeniously contrived to lay joists so as to support his half of the centre bay, without direct support from the Berkshire side, but by the aid of supports derived from the old joists over the centre bay, which rested at one end in Bucks and at the other in Berks. Thereupon, the Berkshire magistrates, unwilling to allow such a triumph to the opponent county, made an order at quarter sessions for cutting through on their own side the old joists of the centre bay.

An information and bill was filed at the relation of the county treasurer for Bucks to restrain the proposed cutting of the joists; and upon a demurrer being put in, Lord Cottenham, in an able judgment, upheld the jurisdiction of the court.

(a) Attorney-General v. Forbes, 2 Mylne & Craig, 123.

Under the head of "*private nuisance*" (or of its equivalent, "*public nuisance*," causing special damage to some particular individual) may be ranged a large variety of injuries; the legal remedy for which, by action on the case, would afford most inadequate redress. Amongst these may be mentioned obstructions to free use of light, as by building so as to darken windows (*a*); interference with the free and healthy use of air, as by burning bricks in the neighbourhood of some particular house (*b*); obstructions to free use of water, as by wrongfully diverting or fouling a stream (*c*); obstructions to rights of way, as by cutting a trench across the road (*d*); and disturbance of rest, as by ringing bells of heavy weight at unreasonable times, of which last kind was the case of the Roman Catholic chapel at Clapham, before referred to (*e*): in all which, and many others, though there be a remedy at law by action on the case, the court will protect the legal right by injunction.

5. My fifth class of cases, "*Waste*," alone remains.

The equitable jurisdiction to restrain waste forms a

(*a*) *Herz v. Union Bank of London*, 1 Jurist (N.S.), 127. See *Isenberg v. East India House Estate Company*, 33 Law Journal (N.S.), Chanc. 392; *Johnson v. Wyatt*, *Ibidem*, 394.

(*b*) *Walter v. Selfe*, 4 De Gex & Smale, 315; *Pollock v. Lester*, 11 Hare, 266. See, too, *Beardmore v. Treadwell*, 3 Giffard, 683; *Crump v. Lambert*, L. R. 3 Eq. 409.

(*c*) *Wood v. Sutcliffe*, 2 Simons (N.S.), 165.

(*d*) *Spencer v. London and Birmingham Railway Company*, 8 Simons, 193.

(*e*) *Soltau v. De Held*, 2 Simons (N.S.), 133; and see *Walker v. Brewster*, L. R. 5 Eq. 25; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388; *Roskell v. Whitworth*, L. R. 5 Ch. App. 459.

large and interesting subject, of which only a very small portion falls within the ambit of my present lecture.

There was at common law a form of proceeding by prohibition to stay waste. Subsequently this was abolished by the Statute of Westminster (*a*). At common law also a writ of *Estrepement* (*b*) lay after judgment, and before execution, to stay waste; and by the Statute of Gloucester (*c*), the operation of this writ was made applicable before judgment where litigation was pending. In other respects the law afforded no protection.

The action of waste gave and gives (for it still lies) none other remedy than that of a punishing or compensating justice.

But equity, in all cases where an "action of waste" would lie, will protect the legal right by injunction, and supply the need of protective justice. Not that you are to suppose that the interference of equity in matters of waste is exercised in aid only of the legal right. On the contrary, it has given redress where none could have been obtained at law. Thus, when an estate was limited to A for life, remainder to B for life, remainder to C in fee, and A, during the lifetime of B and C, committed waste, at law B had no remedy by action of waste, because he was tenant for life only, and the damage must have been laid as having been done to the inheritance; and C had no remedy,

(*a*) 13 Edward I. stat. 2, cap. 14.

(*b*) A word signifying extirpation.

(*c*) 6 Edward I. cap. 13.

because his estate was not in possession. Still, in this case, equity from the earliest times interfered and granted an injunction (*a*).

Again, equity interfered, and still interferes, even as against the strict legal rights of tenant for life without impeachment of waste, by restraining him from committing wilful destruction, as from pulling down mansion-houses (*b*), or from felling timber planted and left standing for ornament (*c*). But these special interpositions of equity, however interesting a branch of study, form no part of the auxiliary jurisdiction of the court (*d*).

Having now pointed out the most important instances of the auxiliary interposition of equity by injunction, it is fitting that I should call your attention to the power recently conferred on the common law courts of granting injunctions.

The Common Law Procedure Act of 1854 (*e*) in substance empowers a plaintiff, at any time after action brought, and either before or after judgment, to

(*a*) Egerton, Lord Keeper, is reported to have stated, in 41st Elizabeth, Moore, 554, that he had seen a precedent of a decision to this effect, of the time of Richard II. At a later date, *an action on the case in the nature of waste* lay; 2 Saunders' Reports, 252, note (7).

(*b*) *Vane v. Lord Barnard*, 2 Vernon, 738.

(*c*) *Marquis of Downshire v. Lady Sandys*, 6 Vesey, 107. See also, *Micklethwait v. Micklethwait*, 1 De Gex & Jones, 504.

(*d*) By section 25, sub-section (3) of the Judicature Act, 1873, it is enacted that "An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

(*e*) 17 & 18 Vict. 125, s. 82.

apply *ex parte* to the common law courts, or a judge, for a writ of injunction, which writ may be granted or denied on such terms as to duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable or just; and, in case of disobedience, the writ may be enforced by attachment.

The new jurisdiction thus conferred may be said, I believe, to be yet on trial; at all events, the reported decisions in reference to its exercise are as yet few in number (*a*).

The path, however, of the common law judges would seem to be tolerably easy. The new jurisdiction is a simple substitute for the auxiliary jurisdiction of the Equity Court, and if exercised liberally, yet with the same sedulous anxiety exhibited by our equity judges to avoid undue interference with legal rights, it ought, in a large number of cases, to render the assistance of equity needless. Indeed, comparing the 62nd section of the Equity Procedure Act of 1852 (*b*), before referred to, with this section of Common Law Procedure Act, the result would seem to be that where the case is one suitable for decision by an equity judge, a bill in equity ought to dispose of the whole matter, including the question of legal right; while, where the circumstances are such that a trial by jury is desirable, an action at law in the first instance, and an applica-

(*a*) See *Jessel v. Chaplin*, 2 Jurist (N.S.), 931; *Baylis v. Legros*, 2 Common Bench Reports (N.S.), 316; *Sutton v. South-Eastern Railway Company*, L. R. 1 Exchequer, 32.

(*b*) 15 & 16 Vict. cap. 86.

tion for an injunction to the common law court, will be the proper course (a).

And here I may observe that it is impossible not to recognise the generally beneficial tendency of the late legislation, communicating to the common law courts powers formerly possessed only by the courts of equity. Let me sum up shortly what has been recently done for the common law jurisdiction in this respect.

Their procedure has been improved by the powers of discovery and production of documents, mentioned and explained in my sixth lecture. They have been invested with the power of granting injunctions just mentioned. Their powers of proceeding by mandamus have been enlarged (b), though not so as to enable them to decree a specific performance under the name of mandamus (c). Something of the nature of a bill for the delivery up of specific chattels has been im-

(a) Subsequent experience showed only a very sparing resort to the new jurisdiction by Injunction at Common Law. This may have been partly attributable to the circumstance that the Common Law Courts could not interfere upon a mere apprehension of wrong. There must have been an existing cause of action to found the jurisdiction. But the superiority of the Chancery procedure in respect to interlocutory injunctions, in point of speed and generally, must be regarded as the principal cause of the Common Law jurisdiction remaining unused.

Since the Judicature Act, 1873, came into operation, the injunction business of the High Court of Justice has still gravitated towards the Chancery Division of the Court in preference to the Common Law Divisions. The Act (see section 25, sub-section 8) and the rules of 1875 in pursuance thereof (see Order lii.), leave the practice almost entirely free and undefined, and in the absence of any chart or compass to guide the conduct of this class of business in the Common Law Divisions, it might have been expected that the resort would be to the Chancery Division.

(b) 17 & 18 Vict. cap. 125, s. 68.

(c) *Benson v. Paull*, 2 Jurist (N.S.), 425.

parted to the action of detinue by giving to the common law judge power upon the application of the plaintiff to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining it (*a*), though the efficacy of this clause is somewhat impaired by the absence of any provision other than distress for enforcing the return of the article (*b*). A power has been given enabling a defendant who is sued at law, but has a clear defence in equity, to set up his equitable defence by way of plea (*c*), so that our jurisprudence is rescued from the absurdity of a man recovering on one side of Westminster Hall what he is bound to pay back on the other (*d*); though the common law judges have decided to allow pleas of this kind only where the equity set up is a simple unqualified answer to the action (*e*). Finally, where an action is now brought upon a bill of exchange or other negotiable instrument, the common law court is invested with the old head of equity jurisdiction, which consisted in ordering the loss of the

(*a*) 17 & 18 Vict. cap. 125, s. 78.

(*b*) In equity there would have been simply a decree for return; and in default of obedience the defendant would be committed. For the present practice under the Rules of the Supreme Court, see note (*a*), page 90, *supra*.

(*c*) 17 & 18 Vict. cap. 125, ss. 83 to 86, which provisions, however, did not apply to an action of ejectment; *Neave v. Avery*, 16 Common Bench Reports, 328.

(*d*) *Note for Student*.—The Court of Chancery used formerly to sit at Westminster.

(*e*) *Wodehouse v. Farebrother*, 5 Ellis & Blackburn, 277; *Best v. Hill*, L. R. 8 C. B. 10.

instrument not to be set up upon a proper indemnity being given (a).

The bare enumeration of these additional powers suggests naturally to the mind the question of the feasibility of a fusion of law and equity; a question far too large for discussion at the present hour, and perhaps altogether too speculative for consideration in a course of elementary lectures (b). It may indeed have occasionally appeared to some of you that I have indulged too freely in matters of mere opinion. The present, however, is certainly not a period at which the law can with advantage be treated dogmatically. These are troublous times, both for jurisprudence and the legal profession. Certainly we lawyers of the present day do not walk in pleasant paths. The shortcomings of the law are freely laid to our charge, and we are expected to make them good.

That the jurisprudence of imperial Rome, based as it was upon a pure despotism (c), should have viewed the legislator as the best expounder of his own laws, need not surprise us. It was, at least, consistent when it is said, "*Vel quis legum ænigmata solvere et omnibus aperire idoneus esse videbitur nisi is cui soli legislatorem esse concessum est?*" (d). But that our countrymen of our own age, members of a free

(a) 17 & 18 Vict. cap. 125, s. 87.

(b) The Judicature Act, 1873, may be regarded as the first and most difficult step, the most difficult because involving the greatest sacrifice of natural feeling and of old-established and cherished privileges, towards the accomplishment of fusion. But much still remains to be done.

(c) *Quod principi placuit legis habet vigorem*; Inst. I. tit. i. l. 6.

(d) Codex, Lib. I. tit. xiv. l. 12.

community, with whom the severance of the legislative from the judicial functions is, or ought to be, an article of political faith, should fall into a converse error, and call upon our profession to do the work of the legislator, and as a simple act of ordinary duty *to reform the law*, may well excite our astonishment. The injustice of the demand is too obvious to need comment. The duty of the legal profession, as a body, is to *work* the law—and hard enough the work often is—not to *make* the law.

We cannot, however, with propriety disregard altogether the general current of the feelings and convictions of that large community of which our smaller one forms part; and if I have occasionally digressed into matters of opinion respecting either the advantages or possible evils of recent legislation, or the probable good to be hoped for from the hand of amending reform, it has been because I felt and feel that a legal education based upon the dry results of authoritative decision and legislative enactment must fall short of what is fairly due to the spirit of our age.

SUPPLEMENTARY LECTURES.^(a)

ELECTION.

A FIRST general notion of the doctrine of Election will, I think, be better conveyed by a simple example than by any general definition.

A testator seised of Blackacre in fee and Whiteacre in tail devises Blackacre to his eldest son and Whiteacre to the younger, and dies. The eldest son claims Blackacre, as devisee, and Whiteacre (which his father had no legal power to devise) as heir in tail. Thereupon a Court of Equity says, No, you shall make your "*election*" to claim either under or against your father's will. You shall not at the same time that you accept Blackacre as devisee deprive your younger brother of Whiteacre by setting up your paramount title as issue in tail.

This illustration is, in fact, that afforded by an Anonymous Case in Gilbert's Equity Reports, page 15, often referred to, and which, as it is very short, I will proceed to read.

(a) The following four lectures formed part of a second course delivered in the years 1858—1859.

“ The case was this :—A. was seised of two acres, “ one in fee, t’other in tail ; and having two sons, he, “ by his will, devises the fee simple acre to his eldest “ son, who was issue in tail ; and he devised the tail “ acre to the youngest son and dy’d : the eldest son “ entered upon the tail acre ; whereupon the youngest “ son brought his bill in this court against his brother, “ that he might enjoy the tail acre devised to him, or “ else have an equivalent out of the fee acre ; because “ his father plainly designed him something. *Lord “ Chancellor.*—This devise being designed as a pro- “ vision for the younger son, the devise of the fee “ acre to the eldest son must be understood to be with “ a tacit condition, that he shall suffer the younger “ son to enjoy quietly, or else, that the youngest son “ shall have an equivalent out of the fee acre, and “ decreed the same accordingly.”

In the simple instance just put, the doctrine and the application of it would probably meet with the approbation of a very large proportion of educated men, whether lawyers or laymen ; and yet, on looking closely, it is impossible not to perceive that this decision contains the first step towards an enormous stretch of authority. The Court of Equity, in fact, imports into the will a condition which is not expressed on the face of it. Let me put another case, and you will, I think, at once see what I mean.

Suppose the father entitled to fee simple property of very large value, and to be also entitled as tenant for life to a small outlying property, of which the eldest son is tenant in fee in remainder, situated in a distant

county and in no way connected with the family estate. Under these circumstances the father makes his will, devising all his real estate, and also the outlying property of his son, to the first son for life, remainder to his issue in tail, remainder to the second son for life, &c. In this case the doctrine of election equally applies—the first son cannot at the same time claim his life estate under the will and claim his own property against it. Yet it is impossible not to feel that the Court may by the application of the doctrine in this case be doing what the testator himself would not have wished to be done.

Before, however, pursuing this matter further, I will indicate shortly the general order I propose to adopt in my discussion this evening.

First.—I shall consider the broad leading principles of the doctrine of election, illustrating them by occasional references to the civil law.

Secondly.—I shall refer to some of the more remarkable classes of decisions establishing that under certain circumstances a case of election does or does not arise.

Thirdly.—I shall add a few words respecting the application of the doctrine to persons under disability.

(I.)—Applying ourselves in the first instance to the consideration of the principles of the doctrine, let us revert to the examples before given. What is it that a Court of Equity does when it calls into operation the doctrine of election? It implies a condition where none is expressed. In the case first supposed, to repeat the words of Lord Chancellor Cowper, “the

“devise of the fee acre to the eldest son is understood to be with a tacit condition that he shall suffer the younger son to enjoy quietly.” In the secondly supposed case, the Court assumes that the life estate in the whole property settled is conferred conditionally only on the son allowing his own small outlying property to be brought into settlement.

But is this a justifiable implication? The testator has imposed no condition in terms. Is a Court of Equity warranted in importing a condition into his will? The answer to this question involves the inquiry, What was presumably the testator's intention? Now it is obvious that the disposition made by the testator must have been made under one of the following states of circumstances:

(a) Either the testator knew that the property which he assumed to deal with was not his own, and yet he advisedly assumed to give it; or,

(β) He so gave it erroneously supposing it to be his own (a).

a.—The first case presents far less difficulty than the second, though (lest any of you should even for a few minutes be left under an erroneous impression) I will say at once that, in our system of equity jurisprudence, the doctrine of election applies equally in each case.

In the first case the testator, conscious of his own want of power, has nevertheless said, I choose this estate which belongs to A. to go as part of my property,

(a) Whether the erroneous belief was due to want of sufficient information or to momentary forgetfulness, seems immaterial.

and it can hardly be doubted that he relies on the benefits which he by his will confers on A. as the inducement to A.'s consenting to ratify his will. Certainly it may be said: "The testator knew the facts, and has omitted to impose any condition; why should you imply one?" The answer is, he has devised to the devisee on the assumption of the latter's compliance. To give the devisee the estate which the testator had power to dispose of, and to allow him to claim his own by title paramount, would be to frustrate the clear undeniable intention of the testator.

β.—But when we approach the secondly supposed state of circumstances, viz. that the testator erroneously supposed that the estate which he has assumed to devise was in fact his own, the difficulty seems far greater (a).

Recollect my secondly supposed illustration, viz. that of a testator including in a general devise in strict settlement a small outlying estate of which he was only tenant for life, and his son tenant in remainder in fee. Assume further, that as regards various other small properties, similarly settled, the testator has abstained from affecting to devise them, but that as regards this particular small estate he had included it under the erroneous belief that it was his own. Here it is almost impossible to resist the conviction that—to apply the doctrine of election—to compel the son to bring his

(a) In *Cooper v. Cooper*, L. R. 6 Ch. App. 15, V.-C. Stuart appears to have considered (see his judgment at note 2, page 16 of the Report) that erroneous belief as respects power of disposition was necessary to raise a case of election. But this doctrine was on appeal treated as unsound.

own estate into settlement, is not to carry out, but to frustrate the wishes which the testator would *probably* have entertained had he known the facts.

It is, however, perfectly clear, that according to our system of jurisprudence, the doctrine of election equally applies. The ground commonly assigned, is that given by Lord Alvanley in his judgment, in *Whistler v. Webster* (a). He there says: "The question is very short; whether the doctrine laid down in *Noys v. Mordaunt* and *Streatfield v. Streatfield*, has established this broad principle; that no man shall claim any benefit under a will, without conforming, as far as he is able, and giving effect, to everything contained in it, whereby any disposition is made showing an intention, that such a thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention; and I will not speculate, upon what he would have intended in different cases put."

I should myself have thought the answer to these observations lay on the surface. The doctrine of election proceeds, or professes to proceed, upon intention. Thus, Mr. Swanston, in his celebrated note to *Dillon v. Parker* (b), says: "The foundation of the equitable doctrine of election is the intention, explicit or pre-

(a) 2 Vesey, jun., 370.

(b) 1 Swanston, 401.

“sumed, of the author of the instrument to which it is applied.” In furtherance of the presumed intention you imply a condition. You assume the testator to say, I give you an interest in my property conditionally on your ratifying the disposition which I have made of your own? But how can the testator be supposed so to speak in a case where, by the hypothesis, he really believes himself to be only dealing with what is his own. The “*intention*” referred to by Lord Alvanley in the words just read, is a different intention altogether, viz. the intention that the devisee shall have a particular estate which the testator professes to devise though it be not his own.

However, that the doctrine of election applies according to our law where the testator erroneously supposes he is dealing with his own property, is a point too firmly settled to admit now of a moment's question. The result would seem to be that the doctrine, though professing to be based upon intention, is wholly independent of it; that the Court presumes an intention, on the part of the author of every instrument, that all persons deriving benefits under that instrument shall be bound to give effect to all dispositions thereby made of their own property; and that it will allow no evidence to be given to show that such presumed intention could not really have existed. The doctrine of election thus becomes a positive rule, independent of intention, yet deriving its value from the fact that it is calculated in a large majority of instances to effect the probable intention.

A few words comparing the rules of the civil law,

from which our own doctrine of election was undoubtedly derived in the first instance, with those of our own jurisprudence, may not be amiss.

According to the testamentary system of the civil law, some person was commonly constituted heir (or, as we should say, devisee), to whom a time was allowed for deciding whether he would accept or renounce the inheritance. If he accepted, he did so subject to all the burdens of debts and bequests which the testator had thought fit to impose. Amongst the burdens thus assumed by the heir was that of procuring for any legatee, or giving to him the value of, any particular subject-matter bequeathed to him which belonged to any third party. Thus a testator said, I bequeath to Claudius the house of Sempronius, situate at Tusculum. If the heir accepted the inheritance, it became his duty either to purchase the house of Sempronius and make it over to Claudius, or, if this was impossible, to pay to Claudius the appraised value of the house.

But this rule applied only where the testator knew that the house was that of Sempronius; and not if he had made the bequest supposing it erroneously to be his own. In the Second Book of the Institutes, title xx., s. 4, after explaining the general doctrine of election, to the effect just mentioned, the 5th section continues thus: "Quod autem diximus alienam rem posse legari, ita intelligendum est, si defunctus sciebat alienam esse, non si ignorabat. Forsitan enim si scivisset alienam rem esse, non legasset."

You will thus observe that the civil law, from which there can be little doubt our own doctrines were derived, differed most materially from ours in excluding, from the application of election, cases proceeding from an erroneous supposition of the testator (*a*).

Bearing, however, in mind that, in our system, election applies whether the testator was or whether he was not aware that he was dealing with property not his own, let us next proceed to examine a little more closely the nature of the condition inferred. I have hitherto referred to it as a tacit condition annexed "that the person owning the property will not dispute the disposition made thereof by the testator." But this is not all. The form of condition assumed is somewhat more complex. I turn again to the Anonymous Case in Gilbert, where the *tacit condition* is said to be, "that he shall suffer the younger son to enjoy quietly, or else have an equivalent out of the fee acre."

The condition assumed to exist is, therefore, you see, alternative in form. This is immaterial where the donee elects to confirm the will, but what is the effect where he elects to take against it? Why, the Court lays hold of the property given to him, and sequesters it for the purpose of making compensation to the disappointed legatee to whom the property of the electing party was bequeathed, in respect of the

(*a*) The French code, rejecting altogether the doctrine of election, provides, Cod. Civ. § 1021, as follows:—"Lorsque le testateur aura légué la chose d'autrui, le legs sera nul, soit que le testateur ait connu, ou non, qu'elle ne lui appartenait pas."

loss which he has sustained by the withdrawal of that property from the operation of the will.

This, you will observe, is a still higher stretch of authority than that hitherto supposed to be exercised.

The tacit condition inferred is not merely "you shall confirm or forfeit," for if this were so, then, upon failing to confirm, the forfeited property would have sunk into the bulk of the testator's estate for the benefit of the heir or residuary legatee; but is, "You shall confirm, or, out of the property given to you by the testator, make a compensation to the person whom you disappoint" (a).

The doctrines of the Court on this point, together with the extreme difficulty of reconciling] them with strict principles of construction, are thus forcibly pointed out by Sir Thomas Plumer in the case of *Gretton v. Haward* (b):—

"Few cases are to to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed, proceeds to the extent of ascribing to the Court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favour of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and

(a) Upon the question whether "compensation" forms part of the Scotch doctrine of "Approbate and Reprobate," see Bell's Commentaries, 6th edition (by Shaw), page 68.

(b) 1 Swanston, 423.

“ which may be said to bring him within the operation
 “ of the general principle, but prevailing as an uni-
 “ versal rule of equity, by which the Court interferes
 “ to supply the defect arising from the circumstance
 “ of a double devise, and the election of the party to
 “ renounce the estate effectually devised; and instead
 “ of permitting that estate to fall into the channel of
 “ descent, or to devolve in any other way, lays hold of
 “ it, to use the expression of the authorities, for the
 “ purpose of making satisfaction to the disappointed
 “ devisee : a very singular office ; for in ordinary cases,
 “ where a legatee or devisee is disappointed, the Court
 “ cannot give relief ; but here it interposes to assist
 “ the party whose claim is frustrated by election.
 “ Such is the language of Lord Chief Justice *De Grey*,
 “ cited with approbation by Lord *Loughborough* ; ‘ the
 “ ‘ equity of this Court is to sequester the devised
 “ ‘ estate quousque till satisfaction is made to the dis-
 “ ‘ appointed devisee.’ I conceive it to be the universal
 “ doctrine that the Court possesses power to sequester
 “ the estate till satisfaction has been made, not per-
 “ mitting it to devolve in the customary course. Out
 “ of that sequestered estate so much is taken as is
 “ requisite to indemnify the disappointed devisee ; if
 “ insufficient, it is left in his hands. In the case to
 “ which I have referred, Lord *Loughborough* uses the
 “ expression that the Court ‘ lays hold of what is de-
 “ ‘ vised, and makes compensation out of that to the
 “ ‘ disappointed party.’ ”

* * * * *

“ It would be too much now to dispute this prin-

“ ciple, established more than a century, merely on
“ the ground of difficulty in reducing it to practice,
“ and disposing of the estate taken from the heir-at-
“ law without any will to guide it ; for to this purpose
“ there is no will ; the will destined to the devisee
“ not this estate but another ; he takes by the act of
“ the Court (an act truly described as a strong opera-
“ tion) ; not by descent, not by devise, but by decree ;
“ a creature of equity.”

These observations of Sir Thomas Plumer lead me naturally to the consideration of the much-vexed question whether, where an election is made to take against the will, the principle to be adopted in adjusting the rights of the parties be forfeiture or compensation ; that is to say, whether a person electing to take in opposition to the terms of an instrument forfeits absolutely all benefit thereunder, or only, as Sir Thomas Plumer has expressed it, so much as is requisite to indemnify the disappointed devisee.

At first blush it might seem unaccountable that a question so fundamental should remain unsettled at the present day. But, on consideration, you will see that circumstances calling for a decision are not very likely to arise. In deciding to elect to take either against or under a will, the person bound to elect will, in the very large majority of cases, be influenced only by his pecuniary interest. If the property bequeathed to him be more valuable than his own, he elects to take under the will ; if less valuable, it matters little whether the principle be forfeiture or compensation, since the whole subject-matter is insufficient to answer

the claim of the disappointed legatee. It is, however, easy to suppose a case calling for a decision, and perhaps it is strange no such case should hitherto have arisen. Thus a testator bequeaths a sum of £100,000 to A., and devises to B. an old family estate of far less value of which he (the testator) is tenant for life only, with remainder to A. Here A., having a special affection for the family property, may elect to take it, and then the question arises, does A. forfeit the whole £100,000, or so much only of that amount as is equal to the family estate which he has taken in opposition to the will? Upon this point I must, for lack of time, content myself by referring you to Mr. Swanston's note to the case of *Gretton v. Haward* (a), and to the more recent authorities referred to in Jarman on Wills (b). You will, I think, be perfectly safe in assuming that compensation, and not forfeiture, is the rule.

The only remaining question of general principle in reference to the doctrine of election is one as to which no reasonable doubt really exists, but to which I advert chiefly that I may recommend to your perusal Mr. Swanston's able note on the subject (c). I mean the question whether the doctrine of election be a purely equitable doctrine, or, as Lord Mansfield on one occasion (and indeed even Lord Redesdale on another (d)) contended, a doctrine of law as well as of

(a) 1 Swanston, 433, note (a).

(b) Vol. I., p. 373 (2nd edit.); pp. 417, 418 (3rd edit.). And see *Rogers v. Jones*, 3 Ch. D. 688; *Pickersgill v. Rodger*, 5 Ch. D. 163, at p. 173.

(c) 1 Swanston, p. 425.

(d) *Birmingham v. Kirwan*, 2 Schoales & Lefroy, 444 (see p. 450.)

equity. It would be vain to attempt to paraphrase the beautifully cogent argument of Mr. Swanston in the note just alluded to. You cannot do better than study it with the utmost care. There can be no doubt that the doctrine is a purely equitable doctrine. Most commonly indeed it is called into operation in the course of some matter in which the Court has already acquired jurisdiction—as where a suit has been instituted for the administration of a testator's estate, and the question incidentally occurs whether a case of election arises upon the will. Occasionally, however, the circumstances calling for the application of the doctrine constitute the sole reason for coming into equity, and then in truth the doctrine becomes really a head of equity jurisprudence.

The case of *Green v. Green* (a) was a case of this kind. There, by a settlement on the marriage of Edward Green with Elizabeth Green, the plaintiff, certain estates to which Edward Green was entitled as tenant in tail in remainder, were expressed to be settled (but without effectually barring the estate tail), as to part to the use of Edward Green for life, remainder to the plaintiff for life, remainder to the first and other sons of the marriage, and as to part to the use of Edward Green for life, remainder to the first and other sons, &c., immediately on the determination of his life estate. Other estates, to which the plaintiff was entitled in fee simple, were by the same

(a) 2 Merivale, 86. See, also, *Brown v. Brown*, L. R. 2 Eq. 481, and cases there cited.

settlement conveyed to similar uses. Upon the death of Edward Green, the defendant Edward Henry Green (his only son and heir-at-law) entered on the estates to which he was entitled as tenant in tail in possession under the settlement, and treating the settlement as ineffectual to bind the estates to which his father was entitled as tenant in tail at the time of the settlement, brought ejectment to recover those portions thereof in which the plaintiff took a life estate by the settlement, and into which she had entered as tenant for life. The widow thereupon filed her bill, and an injunction was granted on the ground of election, to restrain the defendant from proceeding with the ejectment.

The facts of the case just referred to suggest the observation that the doctrine of election applies just as much to double claims under and against a settlement or other instrument as under or against a will. I have hitherto, in the illustrations selected and in the language used, treated the doctrine as arising exclusively upon testamentary instruments, and this, partly because a very large proportion of the cases of election which arise, do in fact arise upon wills, and partly for the sake of brevity. You have only to recollect that where I have used the word "testator," the more comprehensive expression "author of the trust" might have been more correct, though less intelligible; and that where I have spoken of "wills" my observations apply to all instruments. I would further add, that for the sake of convenience I shall throughout the remainder of my lecture adopt generally the same limited phraseology as hitherto.

(II.)—I now pass to the second division of my task, viz., the mention of some of the more remarkable classes of decisions establishing that under certain circumstances the doctrine of election does or does not apply.

In reference to questions of this kind the leading rule is, that you must find on the face of the will a clear intention on the part of the testator to dispose of the property which is not his own. In this sense, the intention, as evidenced by the words of the will, is all important. Bear in mind, however, that this intention is very different from the presumed intention which has been so frequently referred to as forming the groundwork of the doctrine of election. The latter is the presumed intention of the testator that the legatee, whose own property has been devised away, shall elect. The intention now under consideration is merely the intention of the testator, as apparent on the face of the will, to deal with any particular property.

Here the rule is, that if the testator's expressions admit of being restricted to property belonging to himself, they will not be applied to property over which he has no disposing power.

Two very apt illustrations of the application and non-application of this general rule are afforded by the two cases of *Dummer v. Pitcher* (a) and *Shuttleworth v. Greaves* (b).

In the first the testator's will ran thus : " I bequeath

(a) 2 Mylne & Keen, 262.

(b) 4 Mylne & Craig, 35.

“ the rents of my leasehold houses and the interest of
“ all my funded property or estate.”

The testator had in fact no funded property at the date of his will, but there was funded property standing in the joint names of himself and of his wife. After his death the wife claimed by right of survivorship the funded property standing in the names of her husband and herself, and therefore, as she took benefits under the will, it was contended that she ought to elect to give up either those benefits or the funded property.

Lord Brougham (affirming the judgment of the late Vice-Chancellor of England) held, that, although the testator had no funded property at the date of his will, his words might well be understood as applying to funded property at the date of his death, and that therefore he was not to be regarded as intending to dispose of the funded property standing in the joint names of himself and his wife, and consequently that no case of election arose.

On the other hand, in the second case referred to, *Shuttleworth v. Greaves*, where the testator said, “ I bequeath all my shares in the Nottingham Canal Navigation,” the words used were held to refer specifically to shares actually in existence at the date of the will, and the testator having no such shares of his own, but having shares standing in the joint names of himself and his wife, it was held the words of bequest raised a case of election as against the wife.

To the same general rule may be referred the class of cases establishing that where a testator is entitled to

property, subject however to a charge or incumbrance, and he devises it, distinctly describing it, and giving at the same time other property to the incumbrancer, no case of election is raised. The testator is viewed as devising only the property subject to the charge.

So, again, where a testator devises land out of which his widow is dowable, and dies, having bequeathed to her benefits by his will, the rule is clearly settled that the widow is not bound to elect unless you can discover on the face of the will an intention to deal with the property in such a manner as would be inconsistent with her dower being set out to her by metes and bounds.

What circumstances are or are not tantamount to such an inconsistency is often a question of considerable difficulty. A power of sale or a trust for sale has generally been treated as not inconsistent. The trustees, it is considered, may well dispose of the testator's interest in the property subject only to the widow's right of dower. On the other hand, a general power of leasing or of management affecting the whole of the lands is almost necessarily inconsistent with the notion of the widow's personally enjoying her one-third, and therefore, where a power of this kind is conferred by the testator, a case of election will be generally raised. The mass of reported decisions in reference to the obligation of the widow to elect is, however, such that it would be hopeless to attempt even a cursory survey. You may form some notion of its magnitude when I inform you that on the argument before the Lords Justices in one of the

most recent cases (a) no fewer than thirty-three cases were cited.

Again, the same general pervading principle, that to raise a case of election the intention of the testator to dispose of what is not his own must be perfectly clear, may be traced in the class of cases deciding that where the testator has a partial interest in property, as, for instance, a remainder in fee (b), and he disposes of the property by name, he is to be regarded as intending to dispose only of his partial interest and not of the whole fee simple.

Of course, however, the whole tenour of the will is to be carefully considered, and if it appear, as the result of such consideration, that the testator did in fact intend to deal with the whole fee, then the will may well suffice to raise a case of election as against any person interested in the property, and taking a benefit under the will. You will find a very instructive instance of a case of election being thus raised in the recent case of *Wintour v. Clifton* (c).

Let me now direct your attention to a cluster of classes of cases all differing in one main particular from the cases of election hitherto discussed.

(a) *Parker v. Sowerby*, 4 De Gex, Macn. & Gor. 321. For a more recent decision on the question, see *Thompson v. Burra*, L. R. 16 Eq. 592.

(b) See *Rancliffe v. Parkyns*, 6 Dow, 149. It seems now settled, that where a testator entitled to an undivided share of property devises it in terms importing a gift of the entirety, a case of election is raised against another part-owner taking a benefit under the will; *Padbury v. Clarke*, 2 Macn. & Gor. 298; *Fitzsimons v. Fitzsimons*, 28 Beavan, 417.

(c) 21 Beavan, 447; affirmed on appeal, 8 De Gex, Macn. & Gor. 641; and see also *Usticke v. Peters*, 4 Kay & Johnson, 437.

I refer to the instances in which a question of election is raised, not by reason of a testator having assumed to dispose of property *not his own*, but by reason of his having attempted to dispose of some portion of his *own property* by an instrument ineffectual for that purpose.

Many of these questions are becoming daily of rarer occurrence owing to recent alterations in the law, but they are still of considerable practical importance :—

1.—And first, under the law as existing previously to Lord Langdale's Act (*a*), a testator occasionally made a will sufficiently executed to pass his personal estate but insufficiently so to pass real estate. A question then arose whether an heir to whom a legacy had been bequeathed by the will might take his legacy, and also real estate which, being ineffectually devised by the will, had descended to him as heir. It was held, that he might. The ground taken seems to have been that, the will being ineffectual as to real estate, the devises of real estate therein contained must be treated as having been blotted out.

This result appears to have been viewed by eminent judges as far from satisfactory. The chief objection lay in the circumstance that it was clearly established that a testator might, by an unattested will, bequeath personal estate, and annex to this bequest an express condition that the legatee should not take unless he gave up real estate to some one else. Thus the testator might say, "I bequeath 1000*l.* to A" (A being

(*a*) 1 Vict. c. 26.

his heir at law), "provided he makes over Whiteacre to B, and if not, I give the 1000*l.* to B;" and in this case A, the heir, could claim the 1000*l.* only upon giving up Whiteacre (*a*). It was therefore argued that, in a case where a testator merely bequeathed 1000*l.* to his heir A, without, as in the case last supposed, annexing any express condition, and Whiteacre to B, the whole will might well be read for the purpose of annexing to the gift of 1000*l.* a *tacit* condition, similar to the express one which would have been of undoubted validity. It is difficult to resist the force of this argument. One might perhaps not have been surprised had the Court decided that an express condition of the kind mentioned was altogether invalid as a mere scheme to enable the testator substantially to devise the land by an unattested will, but it is difficult to understand how the Courts, after upholding an express condition of the sort, should have hesitated to apply the doctrine of election. Lord Eldon in a leading case (*b*), makes the following observations on the subject:—

"The next consideration is, whether, if real estate, this is not a case of election against the heir. If I was at liberty to read the codicil as an instrument capable of disposing of real estate, there could be no doubt his real meaning was to give the whole property by these two last instruments. I have looked at my

(*a*) See *Boughton v. Boughton*, 2 Vesey senior, 12, a less favourable case for Election, as the decision merely rested on a general clause that any one disputing the will should forfeit all claim.

(*b*) *Sheddon v. Geodrich*, 8 Vesey, 481; see page 496.

“ own note of *Carey v. Askeu*, and Mr. Romilly’s
 “ account of it is very correct.

“ * * * * * Lord Kenyon
 “ said, the distinction was settled, and was not to
 “ be unsettled, that if a pecuniary legacy was be-
 “ queathed by an unattested will, under an express
 “ condition to give up a real estate by that unattested
 “ will attempted to be disposed of, such a condition
 “ being expressed in the body of the will, it was
 “ a case of election; as he could not take the legacy
 “ without complying with the express condition. But
 “ Lord Kenyon also took it to be settled, as Lord
 “ Hardwicke had adjudged, that, if there was nothing
 “ in the will but a mere devise of real estate, the will
 “ was not capable of being read as to that part; and
 “ unless, according to an express condition, the legacy
 “ was given so that the testator said expressly, the
 “ legatee should not take unless that condition was
 “ complied with, it was not a case of election. The
 “ reason of that distinction, if it was *res integra*, is
 “ questionable.”

2.—I pass on to a class of decisions which affords
 an additional testimony to the unsoundness of the
 principle under which the heir of freehold property
 was exempted from obligation to elect. I mean those
 respecting copyholds.

You may remember that, previously to the Act
 55 Geo. III. c. 192 (commonly referred to as Mr.
 Preston’s Act), devised copyholds could only pass
 where they had been previously surrendered to the use
of the owner’s will. Hence, where a testator professed

to devise unsurrendered copyhold property, which therefore for want of a surrender descended to the heir, a question arose whether the copyhold heir could claim both a legacy under the will, and also the copyhold property. It might have been supposed that the will being inoperative altogether as to copyholds, the customary heir would have stood in the same position as the heir of freehold property, professed to be devised by an unattested will. It was held, however; contrary to the analogy suggested by the decisions in regard to the wills of freehold property, that the heir was put to his election (a).

3.—I turn now to a third class of cases; those in which a testator owning Scotch property makes a will professing to devise that property, but inoperative according to Scotch law, and by the same will gives benefits to the Scotch heir. In this case is the latter bound to elect? This was the point for decision in the case of *Brodie v. Barry* (b), where the testator devised to trustees all his freehold, leasehold, copyhold, and other estates, whatever and wheresoever situate, in England, *Scotland*, and elsewhere, upon certain trusts. The will not possessing the solemnities required by the law of Scotland for passing real estate locally situated there, the question was, whether the Scotch heirs, who took interests under the will, could be put to their election. The introductory observations of Sir W. Grant, point out so happily the difficulty of reconciling with sound principles the

(a) See *Highway v. Banner*, 1 Brown's C. C. 584; *Rumbold v. Rumbold*, 3 Vesey, 65.

(b) 2 Vesey & Beames, 127.

decisions upon the cases in reference to freeholds and copyholds just adverted to, that I cannot forbear reading them :—

“ If it were now necessary to discuss the principles upon which the doctrine of election depends, it might be difficult to reconcile to those principles, or to each other, some of the decisions, which have taken place on this subject. I do not understand, why a will, though not executed so as to pass real estate should not be read for the purpose of discovering in it an implied condition concerning real estate, annexed to a gift of personal property; as it is admitted it must be read, when such a condition is expressly annexed to such gift. For if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same, as if it were expressed in words. And then, if it be rightly decided, that a will defectively executed is not to be read against the freehold heir, I have been sometimes inclined to doubt, whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate, as a will defectively executed is for the conveyance of freehold estate.”

Further on in his judgment, Sir W. Grant, after discussing the question which arose whether the case was to be governed by the English or the Scotch law, held that if the English law was to govern his decision, the case must be treated as analogous to that of a devise of unsurrendered copyholds (and the result

upon the Scotch law being the same for other grounds) that the heir must elect (a).

Before parting altogether with the decisions on Copyholds and Scotch property, I may observe, that you will find amongst them cases affording an additional instance of the application of the general canon already noticed—viz., that the intention to dispose by the will of the property which is claimed adversely to the will must clearly appear. I mean the cases deciding that a general devise by the testator of all his lands, whatsoever and wheresoever, does not afford a sufficient indication of intention to pass copyholds or Scotch property to raise a case of election. You must for that purpose find in the will an express reference either to copyhold or to Scotch property, as the case may be (b).

The best cases which you can consult as showing the inefficacy of a general devise for the purpose of raising a case of election are, as to copyholds, *Judd v. Pratt* (c); and as to Scotch property, *Maxwell v. Maxwell* (d).

The principle of the decisions is perhaps best ex-

(a) And in the case of a will insufficiently executed to pass estates in the island of St. Kitt's, it was held by V.-C. Stuart that the colonial heir must be regarded as standing in the same position as (not an heir of an English freehold but) an heir of unsurrendered copyholds or of Scotch estates; *Dewar v. Maitland*, L. R. 2 Eq. 834.

(b) Thus, in *Brodie v. Barry*, in which the doctrine of election was held to apply, the devise was of all the estates, "freehold, leasehold, copyhold, "and other estates whatever, and wheresoever situate, in England, Scot-
"land, and elsewhere."

(c) 13 Vesey, 168; 15 Vesey, 390.

(d) 16 Beavan, 106; 2 De Gex, Macn. & Gor. 705

pressed in the following words of Sir John Leach in the case of *Johnson v. Telford* (a), in which case, as in *Maxwell v. Maxwell*, there was no express reference to Scotch property. Sir J. Leach says:—"In the case " of *Brodie v. Barry* the Scotch estate was mentioned " in the will and expressly intended by the testator " to pass thereby. In *this will* no notice whatever is " taken of the Scotch estate, and the question is, " whether it is clearly to be collected from the general " words used, that the testator meant to pass his " Scotch estate to the uses of his will. *Where a* " *testator uses only general words it is to be intended* " *he means those general words to be applied to such* " *property as will in its nature pass by his will.*"

The same doctrine is more elaborately expounded by Knight Bruce, L. J., in giving judgment in the appeal in *Maxwell v. Maxwell* (b), in which case the devise was by a will, inoperative as to Scotch heritable property, of all the testator's "real and personal " estate whatsoever and wheresoever" (c). His Lordship there expresses himself as follows:—

" It is said on the part of the other children, and " denied on his part, that he must either give up the

(a) 1 Russell & Mylne, 248.

(b) 2 De Gex, Macn. & Gor. 705 ; see p. 713.

(c) In *Orrell v. Orrell*, L. R. 6 Ch. App. 302, where the words used by the testator were : " All the residue of my real estate situate *in any part* " *of the United Kingdom* or elsewhere ; " and where the testator left estates in England and Scotland, but none in Wales or Ireland, it was held by the Lords Justices (James & Mellish), on appeal from the Duchy Court of Lancaster, that a case of election was sufficiently raised against the Scotch heir. The case seems almost on the dividing line between *Brodie v. Barry* and *Maxwell v. Maxwell*.

“ Scotch property for the purposes of the will, or take
 “ nothing under the will; the claim of the younger
 “ children being founded on the generality, the uni-
 “ versality, of the language of gift contained in it. Nor
 “ can he gainsay that the Scotch property was part of
 “ the testator’s estate, or that the will purports to give
 “ all his real and personal estate whatsoever and where-
 “ soever. I apprehend, however, that according to the
 “ principles or rules of construction which the English
 “ law applies,—if not to all instruments, at least to
 “ testamentary instruments liable to interpretation, as
 “ the will in question is,—according to its principles
 “ and rules, the generality, the mere universality, of
 “ a gift of property, is not sufficient to demonstrate or
 “ create a ground of inference that the giver meant it
 “ to extend to property incapable, though his own, of
 “ being given by the particular act. If he has speci-
 “ fically mentioned property not capable of being so
 “ given, the case is not the same; as here, if the
 “ testator had mentioned *Scotland* in terms, or had
 “ not had any other real estate than real estate in
 “ *Scotland*, there might have been ground for putting
 “ the heir to his election.”

There is, however, one class of cases in which, under
 the law as applicable to wills executed previously to
 Lord Langdale’s Act, the doctrine of election is called
 into operation by mere general words. I mean where
 a testator, professing to do what the then state of the
 law did not enable him to do, affected to devise all
the lands of which he might be seised at the date of
his death. In this case the heir, if he took any benefit

under the will, was bound by the doctrine of election to give effect to the attempted disposition of any after-acquired real estate. You may refer on this point to the recent case of *Schroder v. Schroder*, before Vice-Chancellor Wood (*a*), affirmed by Lord-Chancellor Cranworth on appeal (*b*).

Of course you will bear in mind that now, under Lord Langdale's Act (*c*), a will is to be construed, with reference to the property therein comprised, to speak and take effect as if executed at the date of the testator's death, and there can therefore no longer be any room for the operation of this species of election, except as to wills executed previously to that Act.

(III.)—My time permits but a few short observations on the third main division of my lecture, viz., the application of the doctrine of election to persons under disability.

I will take separately the cases of married women and of infants.

Upon this question, as indeed upon almost all others bearing upon the doctrine of election, Mr. Swanston's notes are still our most valuable repertory; and, in this instance, the particular note applicable is also appended to the report of *Gretton v. Haward* (*d*).

As to married women.—You will perceive on reading the note referred to, that a somewhat fluctuating

(*a*) 1 Kay, 571.

(*b*) 18 Jurist, 987; 24 Law Journal Rep. (N.S.) Chanc. 513. And see *Hance v. Truwhitt*, 2 Johnson & Hemming, 216.

(*c*) 1 Vict. cap. 26, sect. 24.

(*d*) See 1 Swanston, p. 413.

practice has prevailed in cases where married women were bound to elect. More commonly it seems to have been assumed that the married woman was competent to elect, though occasionally a reference has been directed to inquire in which way it would be most for the benefit of the *feme covert* to elect.

On the other hand, Vice-Chancellor Wood, in the recent case of Barrow v. Barrow (a), lays down in the strongest terms that a married woman is competent to elect. The Vice-Chancellor thus expresses himself:—

“A married woman can elect so as to affect her interest in real property without a deed acknowledged for that purpose. And where she has not already elected, the Court can order her to signify her election. It was said, that a married woman could not elect so as to bind her real estate; but *Ardesoife v. Bennet* shows the contrary; and that case was followed by others referred to in Mr. Swanston’s note to *Gretton v. Haward*, which establish that she can elect so as to affect her interest in real property; and that, where she has once so elected, though without deed acknowledged, the Court can order a conveyance accordingly; the ground of such order being, that no married woman shall avail herself of fraud. Having elected, she is bound, and the transaction will be enforced against the heir.”

It may, I think, therefore be assumed that *prima facie* a married woman is competent to elect (b), and

(a) 4 Kay & Johnson, 409; see page 419.

(b) In *Cooper v. Cooper*, L. R. 7 H. L. 53, the Lord Chancellor (see

that when she is willing to elect for herself the Court will allow her to do so, unless indeed her husband has an interest in the question and differs in opinion from the wife, in which case considerable difficulty exists (a).

In one particular instance, however, it is distinctly established that a married woman cannot elect, viz., where after marriage a fortune is settled upon her in lieu of dower (b). But this rests upon the particular words of the 9th section of the Statute of Uses (c) which expressly enacts that a jointure made to the wife *after marriage* may be refused by her after the death of her husband.

As regards Infants, the case seems to stand some-

page 67) speaks of one of the appellants as being a married woman "who cannot make an election for herself," and held that there ought to be an inquiry whether it would be for the benefit of her and her children to take under the provisions of a certain will and codicils or against the same, but the case could not safely be treated as establishing more than the propriety of the inquiry in the particular instance.

(a) See *Wall v. Wall*, 15 Simons, 513, 521. In *Griggs v. Gibson*, L. R. 1 Eq. 685, where an annuity was given by will to a married woman on the express condition of her relinquishing a previous provision made for her by settlement, which condition she was unable to comply with to the full extent in consequence of her husband having acquired a life interest in the settled real estate, and of such life interest having passed to his assignee in insolvency, the Court allowed the married woman to elect to take the annuity and to relinquish what she could relinquish, on the terms of compensation being made out of her annuity in respect of the unrelinquished life estate.

(b) See *Frank v. Frank*, 3 Mylne & Craig, 171. And there can be no election by a married woman, even with the sanction of the Court, to give up property to which a restraint on anticipation is annexed; *Robinson v. Wheelwright*, 21 Beavan, 214; 6 De Gex, Macn. & Gor. 535; and see *Stanley v. Stanley*, 7 Ch. D. 589,

(c) 27 Hen. VIII. c. 10.

what differently. The incompetency of infants to elect, and the right of the Court to elect for them, has been almost uniformly assumed by the practice of the Court, though in one instance, *Rushout v. Rushout* (a), a decree appears to have been made that a female infant should make her election at eighteen.

Occasionally, when it has been practicable to do so, without prejudice to the rights of other parties, the Court has deferred the question of election until the infant should be of age. This was done in the leading case of *Streatfield v. Streatfield* (b).

As regards lunatics, these clearly cannot elect, and the correct course must, I conceive, be a reference to inquire what is most for their benefit.

It is hardly necessary for me to say that, though now concluding, I leave still a considerable number of important questions connected with this doctrine wholly untouched: amongst others, the right of the party before making election to be fully in possession of the facts necessary to enable him to form an accurate estimation of his position (c); the question, what acts will be held to amount to an election (d); the application of the doctrine to the cases arising under the execution of powers (e); and the question whether evidence *dehors* the will may be resorted to for the

(a) 6 Brown's Parliamentary Cases, 89.

(b) Cases *tempore* Talbot, p. 176.

(c) See *Dillon v. Parker*, 1 Swanston, 359. *Douglas v. Douglas*, L. R. 12 Eq. 617, at pages 637—8.

(d) See *Worthington v. Wiginton*, 20 Beavan, 67.

(e) Sugden on Powers, chap. 11, sect. v. (8th edit.); and *Churchill v. Churchill*, L. R. 5 Eq. 44.

purpose of raising a case of election (*a*). You must endeavour not merely to fill in the outlines which I have traced, but to make the requisite additions to the foregoing imperfect sketch.

(*a*) Sugden on Powers, p. 587 (8th edit.); Wigram on Wills, 39.

SATISFACTION AND PERFORMANCE.

THE doctrine of satisfaction may be said to arise generally under one of the two following states of circumstances :—

First.—When a father, or person filling the place of a parent, makes a double provision for a child, or person standing towards him in a filial relation.

Secondly.—When a debtor confers, by will or otherwise, a pecuniary benefit on his creditor.

Taking these main divisions in the order stated, and assuming in the first instance, for the sake of simplicity, the case to be one of *father and child*, the first point to be noticed is, that these double provisions for children may occur in the two following ways :—

(*a.*) Either the father first gives to his child by will a legacy, and then on some other occasion—more commonly on the marriage of that child—makes a pecuniary provision for it; or,

(*β.*) The father, on the occasion of marriage or on some other occasion, agrees to make a provision for a child, and subsequently makes a bequest to that child by will.

In each of these cases the general rule of the Court

is, that the benefits given to the child by the second instrument, settlement or will, as the case may be, are to be viewed as a satisfaction (a) of the benefits conferred by the first, whether will or settlement. The Court presumes, that what the father does in each case is done in fulfilment of his moral obligation to make a provision for his child; and it considers that he is to be presumed as not intending a double provision, and that the child, therefore, ought not to claim under both instruments.

I shall say but very few words with reference to the question how far this doctrine, now firmly established, can be regarded as resting on sound principle. The difficulties respecting it lie pretty much on the surface.

Where the father first gives a benefit by will, and then another by settlement, why should he not in the settlement have said that the provision thereby made was in satisfaction of that contained in his previous will?

Similarly, where the agreement for a provision comes first by settlement, why should not the subsequent will have expressed the intention of satisfaction?

The doctrine, in truth, assumes inadvertence and oversight on the part of the father, since the argument that the father may be presumed to have known the law, and to have relied upon it, however permissible, now that the doctrine exists *de facto*, is one that could not for a moment be tolerated when deciding whether the doctrine should or should not be established.

a) See pages 311, 312, *infra*, and note (a), p. 311.

Passing by the question of principle with these short remarks, I proceed now to consider more particularly the first class of cases in which the doctrine of satisfaction is called into play,—viz., that of double provisions for children.

Bear in mind, that these cases of double provisions occur commonly, as already pointed out, in two different ways—*i.e.*,

(a.) First, a will, and then a settlement.

(β.) First, a settlement, and then a will.

Most of the observations I have to make will apply equally to either of these cases. Where there is any marked distinction, I shall endeavour to point it out.

1.—The first general observation is, that in the case of double provisions the doctrine of satisfaction applies only where the parental relation, or its equivalent, exists.

If a person give a legacy to a mere stranger, and then make a settlement on that stranger; or first agree to make a settlement on a stranger, and then bequeath a legacy to him; the stranger is entitled to claim under both instruments.

The foundation of the doctrine in these cases is the parental relation, or its equivalent.

Let me read to you what Lord Eldon says on this point in a case often quoted (a) :—

“ Without going through all the cases that were
“ cited, and those referred to in them, having compared
“ the case in *Atkyns* with manuscript notes of that

(a) *Ex parte Pye*, 18 Vesey, 150.

“ case, and looked into some other cases, one in
“ Ambler, and some earlier, I may state as the un-
“ questionable doctrine of the Court, that where a
“ parent gives a legacy to a child, not stating the
“ purpose with reference to which he gives it, the
“ Court understands him as giving a portion; and by
“ a sort of artificial rule, in the application of which
“ legitimate children have been very harshly treated,
“ upon an artificial notion that the father is paying a
“ debt of nature, and a sort of feeling upon what is
“ called a leaning against double portions, if the father
“ afterwards advances a portion on the marriage of
“ that child, though of less amount, it is a satisfaction
“ of the whole, or in part.”

You note, of course, Lord Eldon’s words, “ in the
“ application of which legitimate children have been
“ very harshly treated.”

This refers to the fact that an illegitimate child is in the eye of the law a *stranger*, and that unless other circumstances are found than the bare relation of parentage “ *by nature*,” the illegitimate child is at liberty to claim a double provision.

Lord Eldon, in his judgment in the case just referred to, expresses himself further on this point, as follows:—

“ I recollect that Lord Thurlow in that case, though
“ the decision did not turn upon it, remarked, that as
“ the law will not acknowledge the relation of a natural
“ child, the doctrine of this Court, on whatever prin-
“ ciple founded, is, that if a portion is given to a child
“ by will, or a gift, so constituted as to acknowledge

“ the legal relation, and afterwards an advancement
 “ is made on marriage, that is *primâ facie* an ademp-
 “ tion of the whole, or *pro tanto*; but if the legacy is
 “ given to a person standing in the relation of a natural
 “ child to the testator, and he afterwards gave that
 “ child a sum of money on marriage, the law does not
 “ admit the conclusion *primâ facie* that the testator at
 “ the time of making the will recognised that relation :
 “ the natural child, therefore, is in so much better a
 “ situation, that in his case the advancement is not
 “ *primâ facie* an ademption, as it is in the case of a
 “ legitimate child; the effect of which is, that the
 “ presumption is to be formed consistently with the
 “ notion that the testator has less affection for his
 “ legitimate child than even for a stranger, as Lord
 “ Thurlow used to express it.”

In the case actually before Lord Eldon, the testator had in fact described the child in question, though in truth his own illegitimate child, as the child of another person, but that circumstance, though material in reference to a point presently to be mentioned, in no way detracts from the authority of the decision, as showing that, in the absence of other circumstances tending to a different conclusion, illegitimate children are to be viewed as mere strangers.

2.—The next general proposition to which I would invite your attention is this, that although the doctrine of satisfaction does not, as a general rule, apply where the beneficiary is a stranger, it may and does apply where the donor has placed himself “*in loco parentis*,” as the phrase is, towards the beneficiary. It was in

reference to this point that the mode in which the testator had, in the case before Lord Eldon, described his own illegitimate child, became material, as showing that he had not assumed the parental character.

But the point demands a closer examination. What is putting one's-self "*in loco parentis*," towards a person for the purposes of this doctrine? Is it necessary that the beneficiary should have been adopted, so to speak, by the donor; should have been received into his household? Must a *quasi* parental relation have been established *in all respects*?

For answers to these questions, I will carry you to the case of *Powys v. Mansfield* (a), admittedly the leading authority on the point, what is putting one's-self "*in loco parentis*"?

There the question arose, whether Sir John Barington, who had by his will given 10,000*l.* to one of his nieces, and had afterwards settled 10,000*l.* upon her marriage, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncles and nieces are thus stated in the report of the case upon the hearing before the Vice-Chancellor of England (b).

"The witnesses deposed, as to the first point, as follows:—That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near Sir John in the Isle of Wight, and maintained a more expensive

(a) 3 Mylne & Craig, 359.

(b) 6 Simons, 544.

“ establishment than his income (which did not exceed
“ 400*l.* a year) would allow of; that Sir John and his
“ brother lived on the most affectionate terms with
“ each other; that, for several years, Sir John gave
“ Sir Fitzwilliam 1,000*l.* a-year; that he took the
“ greatest interest in his nieces, behaved to them as a
“ father, and always acted towards them as the kindest
“ of parents, not showing more partiality to one than
“ to another; that he frequently gave them pocket-
“ money and made them other presents, and occa-
“ sionally advanced money to defray the expense of
“ their clothing and education, that he allowed them
“ to use his horses and carriages, and had them fre-
“ quently to dine with him, and that one or other of
“ them was almost always staying in his house; that
“ he was consulted as to the appointment of their
“ masters and governesses, and as to the marriages
“ of such of them as were married, and that on the
“ plaintiff’s marriage the terms of the settlement were
“ negotiated between the plaintiff and Sir John, and
“ their respective solicitors, without any interference
“ on the part of Sir Fitzwilliam; that Sir John, who
“ gave the instructions for the settlement on the 20th
“ of April, 1817, proposed that the 10,000*l.* should be
“ settled on *all* the children of the marriage, but after-
“ wards, on the suggestion of the plaintiff, it was
“ agreed that the 10,000*l.* should be settled on the
“ younger children only, as the eldest son would be
“ entitled to a considerable estate on his father’s
“ side.”

Upon these facts the Vice-Chancellor of England

decided that Sir John had not placed himself "*in loco parentis*," laying down as a general principle, "that no person can be held to stand *in loco parentis* to a child whose father is living, and who resides with and is maintained by the father according to his (the father's) means."

On appeal Lord Cottenham, in reversing this decision, thus expressed himself:—

"The authorities leave in some obscurity the question as to what is to be considered as meant by the expression, universally adopted, of one *in loco parentis*. Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but, because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says, it is a person meaning to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child; but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference—namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. The relative

“ situation of the friend and of the father may make
“ this unnecessary, and the other benefits most
“ essential.

“ Sir William Grant’s definition is, ‘ A person as-
“ ‘ suming the parental character, or discharging pa-
“ ‘ rental duties,’ which may seem not to differ much
“ from Lord Eldon’s, but it wants that which, to my
“ mind, constitutes the principal value of Lord Eldon’s
“ definition—namely, the referring to the intention,
“ rather than to the act of the party. The Vice-
“ Chancellor says, it must be a person who has so
“ acted towards the child as that he has thereby
“ imposed upon himself a moral obligation to provide
“ for it; and that the designation will not hold, where
“ the child has a father with whom it resides, and by
“ whom it is maintained. This seems to infer that
“ the *locus parentis* assumed by the stranger must
“ have reference to the pecuniary wants of the child;
“ and that Lord Eldon’s definition is to be so under-
“ stood; and so far I agree with it; but I think the
“ other circumstances required are not necessary to
“ work out the principle of the rule, or to effectuate its
“ object. The rule, both as applied to a father and
“ to one *in loco parentis*, is founded upon the presumed
“ intention. A father is supposed to intend to do
“ what he is in duty bound to do, namely, to provide
“ for his child according to his means. So, one who
“ has assumed that part of the office of a father, is
“ supposed to intend to do what he has assumed to
“ himself the office of doing. If the assumption of
“ the character be established, the same inference and

“presumption must follow. The having so acted
 “towards a child as to raise a moral obligation to
 “provide for it, affords a strong inference in favour of
 “the fact of the assumption of the character; and the
 “child having a father with whom it resides, and by
 “whom it is maintained, affords some inference against
 “it; but neither are conclusive.”

Ultimately Lord Cottenham, adopting Lord Eldon’s definition, was of opinion, upon the evidence, that Sir John Barrington did mean to put himself “*in loco parentis*” to the children, *so far as related to their future provision (a)*.

3.—The next general proposition which I have to present is the following:—That it is not necessary, in order that the doctrine of satisfaction should apply, that the sums given by the two instruments be equal in amount, nor that they be payable at the same time, nor even that the limitations for the benefit of the issue of the child provided for be precisely the same. Indeed it must be regarded as rendered somewhat doubtful by the later decisions, whether it is even necessary that the two subject matters should be “*ejusdem generis*” (b).

The case of *Lord Durham v. Wharton (c)* affords a

(a) See *Campbell v. Campbell*, L. R. 1 Eq. 383.

(b) As to this, see *Holmes v. Holmes*, 1 Brown’s Chancery Cases, 553, where a legacy of 800*l.* to a son was held not satisfied by a subsequent gift of a moiety of stock-in-trade of the value of 1500*l.*; and *Dawson v. Dawson*, L. R. 4 Eq. 504, where a share of residue was held partially adeemed by an annual allowance. See, also, *Ravenscroft v. Jones*, 32 Beavan, 669 *Watson v. Watson*, 33 Beavan, 574.

(c) 5 Simons, 297; 3 Mylne & Keen, 472; 3 Clarke & Finnelly, 146

good illustration of the proposition above laid down, that difference in the limitations will not prevent the operation of the doctrine. There a father, by will, bequeathed 10,000*l.* to trustees, one half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile, and declared the trusts to be for his daughter for life, and after her decease, in trust for her children as she should appoint by deed or will, and in default of appointment, for all her children equally; and subsequently, on the marriage of the daughter, agreed to give her 15,000*l.* to be paid to the intended husband, he securing by his settlement, pin-money and a jointure for his wife, and portions for the younger children of the marriage: and it was held, that the 10,000*l.* was satisfied by the sum advanced by the father.

Observe how strong this decision was. By the will the daughter took a life interest: by the settlement a jointure. By the will, *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage. Supposing the daughter to marry a second time, and to have children, the effect of the decision of the House of Lords would be to deprive the children of the second marriage of the benefits given them by the will, upon the mere legal presumption. The principle must, I suppose, be taken to be that in the gift to all the daughter's children, the children were made legatees merely by virtue of their relationship to their mother, and that a gift to a daughter for life, and after-

wards to her children, is to be viewed as constituting in the aggregate a portion for the daughter.

The proposition just laid down that differences in the mode of limitation will not prevent the application of the doctrine, applies similarly where the order of events is, first, a settlement; secondly, a will. This was decided in the case of *Lady Edward Thynne v. Earl and Countess of Glenfall* (a).

There a father having, upon the marriage of his daughter, agreed to give her a portion of 100,000*l.*, transferred one-third thereof in stock to the trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death; the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards, by his will, gave to two of the trustees, a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally, as she should by deed or will appoint. And it was held, that the moiety of the residue given by the will was a satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts (b); and it being found to be for the benefit of the daughter and her children, if

(a) 2 House of Lords Cases, 131.

(b) As to what differences will or will not be considered sufficient to prevent the presumption of satisfaction, see *Russell v. St. Aubyn*, 2 Ch. D. 398; *Tussaud's Estate*, 9 Ch. D. 363.

any she should have, to take under the will, she was held bound to elect so to take.

I must observe, however, that the difficulty of applying the doctrine where the settlement precedes the will, and the trusts are dissimilar, is obviously much greater than where the will comes first (*a*). Where the *settlement* is first in date, the class entitled under that settlement are *purchasers*, and cannot be deprived of their rights upon any presumed intention of the testator. At the utmost they can only be put to their election (*b*). In the case now open before me, this part of the question was relieved from difficulty, because the residue under the will was so large, that, upon a reference to the Master, he reported it would be for the benefit of the children of the marriage, to take under the will in preference to the settlement. Had he reported otherwise, it is not easy to see how the children of Lady Edward Thynne of a second marriage could legitimately have been deprived of what was intended for them by the will, nor how the equities would have been adjusted (*c*).

(*a*) See the observations on this point in the recent case of *Chichester v. Coventry*, L. R. 2 H. L. App. 71 ; and those of Lord Hatherley (when V.-C. Wood) in his subsequent decision of *Dawson v. Dawson*, L. R. 4 Eq. 504, at pp. 512-514.

(*b*) See the observations of Lord Romilly on this point, *Chichester v. Coventry*, L. R. 2 H. L. App. 71, p. 90 ; and the judgment of Cotton, L. J., in *Tussaud's Estate*, 9 Ch. D. 363, at p. 380.

(*c*) In *Chichester v. Coventry*, on the original hearing before Lord Hatherley, then V.-C. Wood (see *Coventry v. Chichester*, 2 Hemming & Miller, 149, at p. 159, reported on the appeal to the Lords Justices, 2 De Gex, Jones & Smith, 336), the Vice-Chancellor appears to have been struck by the circumstance that the doctrine of election was applied by the House of Lords in derogation of the previously acquired rights of Lord

I may add, that this case of *Thynne v. Glengall*, is to be noted as having first established that it is not even necessary that the benefit conferred by the second instrument (in that case it was a moiety of the residue of the testator's estate) should be of any distinct or definite sum. I must warn you, however, that, so far as I am aware, it has never yet been distinctly decided that where a father first by will gives a share of residue, and then settles a definite sum, the doctrine of satisfaction applies (*a*).

4.—The next question is, as to the operation of the doctrine where the sum given by the second instrument is less than that given by the first. Does the smaller sum operate as a complete satisfaction of the larger? A moment's consideration will show you that this question can only arise when the order of events is, first *will*, and then *settlement*; since where the settlement precedes, the right is a right conferred by positive contract, and no subsequent will or voluntary gift can diminish that right. It was, however, long considered that in cases where a father first made a provision for a child by *will*, and subsequently, on the occasion of that child's marriage, made a smaller pro-

Edward Thynne under the settlement which made him a joint donee with his wife of the power of appointment amongst children. That the previously acquired rights of the wife and issue under a marriage settlement cannot be satisfied by a subsequent testamentary gift by the covenantor to the husband (his son) absolutely is established by *McCarogher v. Whieldon*, L. R. 3 Eq. 236. And see *Mayd v. Field*, 3 Ch. D. 587.

(*a*) It was so decided shortly after the delivery of the Lectures, in *Montefiore v. Guedalla*, 1 De Gex, Fisher, & Jones, 93, in connection with which case the student may with advantage read the more recent one of *Meinertzhagen v. Walters*, L. R. 7 Ch. App. 670.

vision by *deed*, the later provision wholly satisfied the earlier. Lord Eldon's views of the law on the subject, together with his doubts as to the soundness of the result, are thus characteristically expressed in the case of *Ex parte Pye*, so frequently referred to already. He says, in speaking of the doctrine :—

“ And in some cases it has gone a length, consistent
 “ with the principle, but showing the fallacy of much
 “ of the reasoning, that the portion, though much less
 “ than the legacy, has been held a satisfaction in some
 “ instances ; upon this ground, that the father, owing
 “ what is called a debt of nature, is the judge of that
 “ provision by which he means to satisfy it ; and
 “ though at the time of making the will he thought
 “ he could not discharge that debt with less than
 “ 10,000*l.*, yet by a change of his circumstances
 “ and of his sentiments upon that moral obligation,
 “ it may be satisfied by the advance of a portion of
 “ 5,000*l.*”

Observe those remarkable words, ‘ consistent with
 ‘ the principle, but showing the fallacy of much of
 ‘ the reasoning.’ There is, I think, no doubt that if
 the assumed groundwork of the doctrine had been
 maintained in its integrity, it would have been impos-
 sible to escape the conclusion that the smaller was to
 satisfy the larger. Lord Cottenham, however, in his
 first Chanceryship, revolting from the logical conse-
 quences of the doctrine, decided, in the well known
 case of *Pym v. Lockyer* (a), contrary to the generally

(a) 5 Mylne & Craig, 29.

received opinion of the profession, that advancements subsequent to a will were to be satisfactions *pro tanto* only.

The judgment in which Lord Cottenham thus broke through the trammels of the doctrine, or rather, I should say, of the assumed groundwork of the doctrine, is so interesting that I cannot forbear quoting from it at some length. Lord Cottenham says:—

“When, upon the first argument of this case, I had come to the conclusion that the testator had placed himself *in loco parentis*, and that the effect of the portions upon the provisions by the will was, therefore, to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession, and laid down in all the text-books of authority, and apparently founded upon the highest authority, was to regulate the division of the property; the rule to which I refer being, that a portion *advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion*. I could not but feel that, in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father who makes his will dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If sub-

“sequently, upon the marriage of any one of them, it
“become necessary or expedient to advance a portion
“for such child, what reason is there for assuming
“that the apportionment between all ought, therefore,
“to be disturbed? . . . The supplying the wants of
“one child for an advancement is not permitted to
“lessen or destroy the provisions made for the others,
“by giving both provisions to the child advanced; but
“the supposed rule that the larger legacy is to be
“adeemed by the smaller provision, appears to me not
“to be founded on good sense, and not to be adapted
“to the ordinary transactions of mankind, and to be
“subversive of the obvious intention of the parent.
“Can it be assumed, as a proposition so general as
“to be the foundation of a rule of property, in the
“absence of any expressed intention, that the mar-
“riage of one child and the advancing a portion to
“such child, furnishes ground for the father’s altering
“the mode of distributing his property amongst his
“children, by taking from the portion previously des-
“tined for that child, and, to the same extent, adding
“to the provision for the others? Is it not, on the
“contrary, the usual course and practice that the
“father, upon a child’s marriage, parts with the con-
“trol over as little as possible, preferring to reserve to
“himself the power of disposing of the residue of the
“portion destined for such child, as its future circum-
“stances and situation may require? In doing so,
“the father is not influenced only by the natural pre-
“ference of bounty to obligation, but adopts a course
“which he may well be supposed to think most bene-

“ ficial for his children. Where, then, is the ground
“ of the presumption, that he intended, by advancing
“ part of what he had destined as the portion of that
“ child, to deprive that child of the remainder ?

“ The argument in favour of the proposition appears
“ to me to be founded upon technical reasoning as to
“ the term ‘ portion,’ without due consideration of the
“ sense in which that term is used. The giving a por-
“ tion to a child is said to be a moral debt, but of the
“ amount of which the parent is the only judge ; and,
“ although the parent has, by his will, adjudged the
“ amount of that moral debt to be a certain sum, he
“ is supposed, by the settlement, to have departed
“ from that judgment, and to have substituted the
“ amount settled : and this only because the one pro-
“ vision and the other are considered as a portion.
“ This, however, assumes the portion settled to be
“ intended as a substitution of the portion given by
“ the will ; and such intention, if proved, would re-
“ move all doubt ; but the question is, whether such
“ intention is to be presumed, in the absence of all
“ proof. Is it not more reasonable to suppose that
“ the intention as to the amount of the portion re-
“ mains the same, and that the sum settled is only
“ an advance of part of what the will declares to have
“ been the intended amount of the whole ? ”

After further observations Lord Cottenham con-
cluded by stating that it appeared to him that all
reasoning and all analogy were against the supposed
rule ; and after examining the authorities, he arrived
at the conclusion that there was not sufficient authority

to support the supposed rule, and that, as it was opposed to principle, it was his duty to decline following it, notwithstanding its general previous reception in the legal profession.

5.—Next, as to resorting to “extrinsic evidence.” It is to be borne in mind that the rule against double portions is a presumption of law, and like other presumptions of law may be rebutted by extrinsic evidence; i.e., evidence not contained in the written instruments themselves.

This is a general rule of evidence, which applies in many other similar cases (*a*).

You cannot, it is well known, go into evidence to add to, vary, or explain a written instrument. But in the cases we are now considering, the instruments say nothing as to satisfaction. The satisfaction is presumed by the law, and if it can be shown by evidence *dehors* the written instrument that the presumption is incorrect, it will not be made. It is therefore competent to the party claiming double portions to show that, although the presumption be against him, the donor, in fact, intended him to have double portions (*b*); and flowing from this right of the party claiming doubly to go into evidence to rebut the presumption of law, there arises a right on the part of those who oppose his double claim also to go into counter-evidence to support the presumption.

(*a*) e.g., cases as to double legacies, as to the executors taking residue beneficially (where the 11 Geo. IV. & 1 Will. IV. cap. 40, does not apply), &c.

(*b*) See Tussaud's Estate, 9 Ch. D. 363 (pp. 373-375).

Bear in mind, however, that there is no original right on the part of the person seeking to dispute the double provision to establish, by independent evidence, that a double provision was not intended. Unless the instruments themselves do, in the first instance, raise a presumption against double provisions, the claim to double provision succeeds as of course. The right of the party disputing double provisions is merely a right to meet, by counter-evidence, evidence adduced by the other side to rebut the presumption. It is necessary to warn you that the observations of Sir John Leach on this point in *Weall v. Rice* (a), cannot safely be treated as law (b).

Extrinsic, or rather parol, evidence may, however, occasionally form the whole groundwork of the application of the doctrine. Thus the transaction upon which the alleged satisfaction depends may be altogether unsupported by written evidence. Such was the case in *Kirk v. Eddowes* (c). There a father bequeathed 3,000*l.* for the separate use of his daughter for life, with ulterior trusts for her children. Subsequently he gave the daughter and her husband a promissory note for 500*l.*, and Vice-Chancellor Wigram held that it was competent to the parties who alleged that this transaction operated as a satisfaction to go into evidence respecting all the circumstances of the

(a) 2 Russell & Mylne, 263.

(b) See *Hall v. Hill*, 1 Drury & Warren, 94, pp. 129-138; *Palmer v. Newell*, 20 Beavan, 32; *Taylor on Evidence*, 1036 (4th edit.), 1056 (5th edit.).

(c) 3 Hare, 509.

transaction, including the declarations made by the testator at the time of handing over the note.

I may observe, in passing, that you will find in Vice-Chancellor Wigram's judgment in this case some admirable observations, well calculated to remove the doubts which must at some time or other cross the mind of almost every inquiring student in reference to this doctrine of satisfaction. Consider the facts in *Kirk v. Eddowes*. A testator by his will bequeaths a legacy. He then hands over a promissory note. How can the will be thus informally revoked? The answer is, it is not revoked at all. The operation is analogous to that of a common case of ademption, and in truth is commonly described by the same word "ademption" (a).

You know the general operation of ademption. A testator says, "I bequeath my black horse Dobbin." Dobbin dies. The testator dies. The legacy fails, not because it is revoked, but because there is no subject-matter to satisfy it. It is, to use the technical term, "adeemed," or "taken away," for want of subject-matter to answer it. The operation of satisfaction is, if I rightly understand the theory, of a converse kind. The will gives a legacy as a portion. A portion is subsequently provided by act "*inter viros*." The will remains intact, but the legatee is not paid his portion,

(a) See the observations of Lord Romilly in *Chichester v. Coventry*, L. R. 2 H. L. App. 71, at pp. 90, 91, in which his Lordship treats the expression "satisfaction" as properly applicable only where the settlement comes first and the will subsequently; and those of Cotton, L. J., in *Tussaud's Estate*, 9 Ch. D. 363, at p. 380.

because he has already *had it*. The legacy is adeemed by satisfaction, just as in the other case it is adeemed for want of a subject-matter to operate upon. Hence the Vice-Chancellor's words in *Kirk v. Eddowes* :—
“Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends. The defendant does not say the will is revoked; he says the legatee has received his legacy by anticipation.”

(II.)—I pass now to the second main division of the cases relating to satisfaction, viz., those of satisfaction of a debt.

And here at the outset let me warn you that while using the word “*debt*,” I mean to exclude from its signification any obligation which, though in the nature of a debt, yet falls also within the description of a provision for a child. Thus in every one case of double portions just treated of where the order of events is first settlement—and then will—the settlement is in fact a “*debt*,” for I need hardly say that where a father actually *transfers* by way of settlement for a child, say 10,000*l.* stock, and then by subsequent will leaves (say) 10,000*l.* or 15,000*l.* to the same child, no case of satisfaction can arise. The gift by settlement has been made outright, and that by will comes as an additional gift. It is only where the settlement exists in the form of liability or debt, that a gift by subsequent will can be deemed a satisfaction. Such was the case of *Thynne v. Earl of Glengall*, just now referred to. That very case affords, indeed, one of the best general statements that I can refer you to

respecting the peculiarities of the doctrine of satisfaction of debts by legacies as distinguished from that of satisfaction of portions—a statement which in its very terms assumes that a settlement agreed to be made by a father, though in one sense a *debt* (a), stands on an entirely different footing as respects the doctrine of satisfaction. Lord Cottenham, moving the judgment of the House, expressed himself thus :—

“ Before I consider the authorities as applicable to
 “ the facts of this case I think it expedient to throw
 “ out of consideration all the cases which have been
 “ cited, in which questions have arisen as to legacies
 “ being or not being held to be in satisfaction of debt ;
 “ for, however similar the two cases may at first sight
 “ appear to be, the rules of equity as applicable to
 “ each are absolutely opposed the one to the other.
 “ Equity leans against legacies being taken in satis-
 “ faction of debt, but leans in favour of a provision by

(a) According to the recent decision in *Chichester v. Coventry*, L. R. 2 H. L. App. 71, the doctrine of satisfaction does not so completely alter the legal aspect of a covenant by way of settlement on a child as to prevent a subsequent direction in a will for payment of debts from applying to the covenant. In that case there was first a covenant for payment of 10,000*l.* to the trustees of a daughter's settlement, and subsequently a will directing payment of debts, and giving a moiety of the residue upon trusts for the daughter and her issue, and the direction to pay debts was relied on as a material circumstance for excluding the operation of the doctrine of satisfaction. Upon this decision Lord Hatherley has observed :—“ I think
 “ after that case it will be exceedingly difficult to hold that any subse-
 “ quent provision by will, after a covenant or engagement by bond in a
 “ previous instrument, will be a satisfaction of the debt contained in the
 “ previous instrument, because there are so very few wills in which there
 “ is not a direction to pay debts, that the case of course would seldom
 “ happen ;” *Dawson v. Dawson*, L. R. 4 Eq. 504 at p. 513. See *Bennett v. Houldsworth*, 6 Ch. D. 671.

“ will being in satisfaction of a portion by contract,
 “ feeling the great improbability of a parent intending
 “ a double portion for one child, to the prejudice
 “ generally, as in the present case, of other children.
 “ In the case of debt, therefore, small circumstances
 “ of difference between the debt and the legacy are
 “ held to negative any presumption of satisfaction ;
 “ whereas in the case of portions, small circumstances
 “ are disregarded. So in the case of debt, a smaller
 “ legacy is not held to be a satisfaction of part of a
 “ larger debt : but in the case of portions it may be
 “ satisfaction *pro tanto*. It has been decided that in
 “ the case of a debt, a gift of the whole or part of the
 “ residue cannot be considered as satisfaction, because
 “ it is said that, the amount being uncertain, it may
 “ prove to be less than the debt.”

This statement embodies to a great extent the leading peculiarities of the doctrine of satisfaction of debts by legacies.

(a.)—The leaning is against satisfaction instead of being in favour of it, as in the case of portions.

(β.)—Small circumstances of difference are sufficient to repel the presumption : as where the legacy is of less amount than the debt (*à fortiori* of course if the thing be not “*ejusdem generis*,” as land or specific chattels), or even where the amount is merely uncertain, as the gift of a residue, in both of which cases satisfaction takes place in regard to portions (a).

(a) So, although where a portion is given to a child by will, and a subsequent provision is made for the same child by an instrument creating a debt, a direction in the will to pay debts and legacies is not sufficient to

In reference to these cases of satisfaction of debt by a legacy, Sir Thomas Clarke in delivering judgment in *Matthews v. Matthews (b)*, mentions a remarkable instance of the inclination of the Court to lay hold of any small circumstance for the purpose of evading the application of the doctrine. He says :—"I remember " a case before the Lord Chancellor where an old lady " indebted to a servant for wages, by will gave ten " times as much as she owed or was likely to owe ; " yet because made payable in a month after her own " death, so that the servant might not outlive the " month, although great odds the other way, the Court " laid hold of that."

This illustration shows that the legacy to be a satisfaction must be certainly payable. Any contingency, however remote, will prevent satisfaction.

Time does not permit me to dwell longer on the various circumstances which have been held sufficient to repel the presumption of satisfaction of a debt. I deem it of more importance to attempt to convey a clear notion of the position of this branch of my sub-

rebut the ordinary presumption of satisfaction (see *Trimmer v. Bayne*, 7 Vesey, 508 ; *Dawson v. Dawson*, L. R. 4 Eq. 504), and although notwithstanding the observations of Lord Hatherley in *Dawson v. Dawson* (see note (a), at p. 313, supra), it may be doubted whether a simple direction to pay debts will, standing alone, be sufficient to prevent the presumption in the case of a settlement on a child by way of covenant followed by a will containing the direction, it must be considered settled that in cases not falling within the doctrines applicable to double portions a direction to pay debts will *per se* be sufficient to exclude satisfaction (see *Cole v. Willard*, 25 Beavan, 568 ; *Pinchin v. Simms*, 30 Beavan, 119).

(b) 2 Vesey senior, 636.

ject in reference to questions strictly of ordinary debts arising between parent and child.

I have already pointed out that a debt in the shape of a covenant to settle falls within the head of law applicable to double portions. On the other hand, where a father owes a child a mere debt, as where father and son are in partnership, and a debt is due from the former to the latter on the result of partnership transactions, a legacy to the son, who is a creditor, must be governed by the same principles in respect to satisfaction, as if the son were a perfect stranger in blood.

So where a father owed his daughter 200*l.* as executor of the will of a third person, and then gave her 500*l.* by his own will to be paid to her at the age of 21 years if she should arrive to that age but not otherwise, it was held she might claim both the 200*l.* owing by her father, and the provision made by the father's own will (*a*).

On the other hand, it has been decided that, where the father, being a debtor to the child in his lifetime, makes an advancement to the child upon marriage, or some other occasion, that advancement will presumably be a satisfaction. And the case is the same, even though the money be advanced on the occasion of a daughter's marriage, in consideration of a settlement made on the part of the intended husband; and even though the intended husband be ignorant of the daughter's rights, as creditor against her father.

(*a*) *Tolson v. Collins*, 4 Vesey, 482; and see *Stocken v. Stocken*, 4 Simons, 152; *Fairer v. Park*, 3 Ch. D. 309.

I must confess I find it impossible to reconcile these decisions with sound principle. In order to justify them it seems necessary to disregard the circumstance that full knowledge on the part of the husband might have led to entirely different arrangements. A man about to marry a lady of full age, entitled to, say, 10,000*l.* owing to her by her father, that father being at the same time willing to give an additional 5000*l.*, stands in a very different position in respect to negotiation from one who supposes the father to be settling 15,000*l.* of his own free bounty. I should have thought the grounds for not implying satisfaction infinitely stronger in a case of this kind, than in one of a gift by will like that just referred to. However, if you want to see the decisions on this point ably reviewed, let me recommend you to turn to *Plunkett v. Lewis (a)*, where, in the judgment of Sir James Wigram, you will find all that can be said.

Meanwhile it is sufficient for me to impress upon you, as being decided law, that while a legacy by will does not (except when it would do so as between strangers), an advancement by the parent by settlement does, operate as a satisfaction of a simple debt owing by the parent to the child.

I pass now to the second subject mentioned in the prospectus of my lecture for this evening, viz., "*Performance.*"

Cases of performance are divided by a very narrow line from those of satisfaction.

(a) 3 Hare, 316.

The ordinary mode of distinguishing satisfaction from performance is by saying that satisfaction implies the substitution or gift of something different from the thing agreed to be given, but equivalent to it in the eye of the law, while in cases of performance the thing agreed to be done is in truth wholly or in part performed.

The two principal classes of cases in respect to performance are commonly illustrated by *Wilcocks v. Wilcocks* (a), *Blandy v. Widmore* (b).

Wilcocks v. Wilcocks was the case of a covenant by a man on marriage to purchase lands of 200*l.* a year, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail. He purchased lands of that value, and took a conveyance to himself in fee, making no settlement. At his death, his heir, who was also entitled under the settlement as first son, claimed the purchased lands as heir, and also to have the covenant performed by laying out an adequate portion of the personalty in the purchase of land. It was held, that the lands descended were to be deemed a satisfaction of the covenant.

In *Blandy v. Widmore*, a man before marriage covenanted to leave his intended wife 620*l.* He died intestate, and the wife's share under the Statute of Distributions exceeded 620*l.* This was held a performance.

(a) 2 Vernon, 558.

(b) 1 Peere Williams, 324 ; see also this and the last preceding case, White & Tudor's Leading Cases, vol. ii. pp. 376, 378 (3rd edit.).

The two classes of cases are then these :—

- (1.) Covenant to purchase and settle land, and a purchase made without an express settlement.
- (2.) Covenant to leave property, and the receipt of a share by the covenantee under an intestacy.

In reference to the first class of cases, let me say, that the acts done commonly approach much less nearly to “performance” than in the second. Indeed, in *Wilcocks v. Wilcocks*, the word “performance” does not even occur. The phrase used by the Judge in deciding the case, was satisfaction. This class of decisions is perhaps better represented by *Lechmere v. Lechmere*, which was decided by Lord Talbot on appeal from Sir Joseph Jekyll (a).

The facts were as follows: Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, and in consideration of 6000*l.* portion, covenanted to lay out, within one year after the marriage, the said sum of 6000*l.*, and likewise the farther sum of 24,000*l.*, amounting in the whole to 30,000*l.*, in the purchase of freehold lands in possession; which were to be settled upon Lord Lechmere himself for life, remainder to trustees to preserve contingent remainders, remainder to trustees for five hundred years, for raising portions for the daughters of the marriage, remainder to Lord Lechmere in fee. Lord Lechmere further covenanted until the 30,000*l.* should be laid out to pay interest for the same after the rate of 5*l. per cent.*, unto the persons entitled to

(a) *Cases temp. Talbot*, p. 80.

the rents and profits of the lands when purchased. Lord Lechmere, after his marriage, purchased several estates in fee simple in possession, but which were never settled according to the covenant, as also several terms and reversions, and subsequently died intestate and without issue, leaving a considerable real estate to descend upon the plaintiff, his nephew and heir-at-law. His widow, Lady Lechmere, took out administration, and the nephew brought his bill against her for an account of Lord Lechmere's personal estate, and to have this covenant carried into execution. The defendant, Lady Lechmere, contended that the lands which descended to the plaintiff must be treated as a satisfaction of the covenant. Sir Joseph Jekyll held them to be no satisfaction (a).

An appeal being brought from that decision, Lord Talbot, in his judgment upon this point, expressed himself thus (b):—"The cases upon satisfaction are generally between debtor and creditor; and the heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is, that it depends upon the intent of the party; and that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions; as, that the thing intended for a satisfaction be of the same kind, or a greater thing in satisfaction of a lesser: For, if otherwise, this Court will compel a man to be just before he is generous; and so will decree both. But these questions are no way material

(a) *Lechmere v. Earl of Carlisle*, 3 Peere Williams, pp. 224, 227.

(b) *Cases temp. Talbot*, 80, at p. 92.

“ in this case, which turns entirely upon my Lord
“ Lechmere’s intent at the time of these purchases
“ made. Those made before the covenant can never
“ have been designed to go in performance of the sub-
“ sequent covenant, his intent being clear, that the
“ whole sum of 30,000*l.* should be laid out from the
“ time of the covenant. Then there are terms, with
“ covenants to purchase the fee, but terms are not
“ descendible to the heir, and so no satisfaction. The
“ like of reversions, especially seeing the lives did not
“ fall in during the Lord Lechmere’s own life. But as
“ to the purchases of lands in fee simple in possession,
“ it is to be considered that there was no obligation
“ upon the Lord Lechmere to lay out the whole sum at
“ one time. Now here are lands in possession, lands of
“ inheritance, purchased ; which, though not purchased
“ with the privity of trustees, yet it was natural for the
“ Lord Lechmere to suppose that the trustees would
“ not dissent from those purchases, being entirely
“ reasonable ; the design of inserting trustees being
“ not to prevent proper but improper purchases : And
“ though they were not purchased within the year, yet
“ nobody suffered by it ; and so this circumstance can-
“ not vary the intent of a party in a Court of Equity.
“ The intent was, that as soon as the whole was laid
“ out, it should be settled together ; and not to make
“ half a score settlements. In the case of *Wilcox and*
“ *Wilcox*, 2 Vernon, 558, the covenant was not per-
“ fected ; nothing done towards it strictly, but some
“ steps taken by the ancestor which seemed to be in-
“ tended that way : And it is as reasonable to suppose

“ these purchases to have been intended to satisfy this
“ covenant in the present case, as it was to suppose it
“ so in that.”

Accordingly, Lord Talbot varied the decree only as to the fee simple lands in possession purchased since the covenant.

You will note with reference to this decision : first, that as to the lands purchased previous to the covenant, it was considered (and one might say necessarily so) that they could not be regarded as purchased in pursuance of the covenant ; and secondly, that the purchases of the reversions were considered as not made in performance of the covenant.

In short, in these cases the turning point is, whether the fair implication from the facts be or be not that the lands were purchased in performance of the previous engagement entered into.

Here let me warn you that you may occasionally find referred to amongst the cases relating to “ performance ” a class of decisions which relate to an entirely different head of equity. I mean cases depending upon the principle that any party interested in a fund held upon trust, is entitled to follow that fund either into land or into any other subject-matter upon which it may, though wrongfully, have been laid out (*a*). Such was the case of *Trench v. Harrison* (*b*). There trustees of a settlement had power, with the consent

(*a*) See *Taylor v. Plumer*, 3 Maule & Selwyn, 562; and the cases collected in Lewin on Trusts, 645 note (*c*) (5th edit.), 731 note (*a*) (6th edit.), and *Ex parte Cooke*, 4 Ch. D. 123,

(*b*) 17 Simons, 111,

of the husband and wife, to lay out the trust funds in the purchase of (amongst other lands) copyholds of inheritance. The husband obtained the fund and purchased copyholds *for lives*—a description of property not authorised by the settlement; and it was suggested that on that ground, as in *Lechmere v. Lechmere*, the copyholds did not belong to the trust, but the Vice-Chancellor of England held that whether the purchase was or was not authorised by the settlement, still as between the trustees and the husband the property was trust property. The case was in fact the common case of tracing trust money into land, the whole doctrine as to which you will find fully discussed in *Lench v. Lench* (a), decided by Sir William Grant.

These cases of following trust money into land have occasionally some slight points of contact with the cases of performance properly so called; but in their leading features they are essentially different. Thus in the ordinary case of performance the claimant is told that his claim is in truth satisfied by some act done in performance of the prior obligation entered into; while in the cases of following trust money the endeavour is to show, that even though the money be not clearly traceable into the land, the land must be presumed to have been purchased with the trust money for the purposes of the trust (b).

A few words are all that I can give to the cases represented by *Blandy v. Widmore* (c). That was in all

(a) 10 Vesey, 511.

(b) See Lewin on Trusts, 645-649 (5th edit.); 730-734 (6th edit.).

(c) 1 Peere Williams, 324.

strictness a case of actual performance. The husband covenanted to leave (it was not said by will), and he did *leave*.

But the doctrine is not confined to cases so favourable to its application as that of *Blandy v. Widmore*. Thus it applies where a husband, after covenanting to leave a sum of money to his wife, makes a will containing an attempted disposition of his property in contravention of his covenant, and where this attempted disposition failing, a share of the personal estate, by such failure, devolves on the wife (*a*).

It does not, however, apply where the thing covenanted to be secured is an annuity (*b*). Neither does it apply where performance in the technical sense is no longer possible by reason of the covenant having been broken in the intestate's lifetime, for then the case becomes one of *debt*.

Thus, suppose a covenant by an intended husband in a marriage settlement to pay a sum within two years after marriage; the husband lives for two years; thereupon a debt arises, and nothing accruing to the wife by intestacy can possibly operate as a satisfaction.

With this meagre reference to the class of cases represented by *Blandy v. Widmore*, I must conclude my Lecture.

a) Goldsmid v. Goldsmid, 1 Swanston, 211.

b) Couch v. Stratton, 4 Vesey, 391; Salisbury v. Salisbury, 6 Hare, 526.

CONVERSION.

CONVERSION (the subject of this and my next Lecture) has been defined to be “that change in “the nature of property by which, *for certain purposes*, real estate is considered as personal, and “personal estate as real, and transmissible and descendible as such.”

Perhaps, on the whole, the best general statement of the doctrine is that contained in the judgment of Sir Thomas Sewell in *Fletcher v. Ashburner* (a), who there says:—

“Nothing is better established than this principle, “that money directed to be employed in the purchase “of land, and land directed to be sold and turned “into money, are to be considered as that species “of property into which they are directed to be converted, and this in whatever manner the direction “is given; whether by will, by way of contract, “marriage articles, settlement, or otherwise, and “whether the money is actually deposited or covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner

(a) 1 Brown's Chancery Cases, 497, see p. 499.

“ of the fund or the contracting parties, may make
“ land money, or money land.”

Sir Thomas Sewell, as you observe, makes the doctrine rest upon the intention of the testator, settlor, or other author of the trust: and doubtless that is the true principle.

You are not, however, to suppose that it is necessary to find upon the face of the instrument of trust an express declaration that, though the land be not purchased, the money shall go as land; or, though the land be not sold, the land is to go as money. All that is requisite is an absolute expression of intention that the money shall be laid out on land, or that the land shall be sold and turned into money. When once this intention is sufficiently expressed, the accidental circumstance that the money has in fact not been laid out in land, or the land in fact not been sold and turned into money, can have no effect; for here the maxim of Equity applies—“that what ought to be done, shall be considered as done.”

Thus Sir Joseph Jekyll, in a case often quoted (a), says:—“ The forbearance of the trustees in not doing
“ what it was their office to have done, shall in no sort
“ prejudice the *cestuis que trust*, since at that rate it
“ would be in the power of trustees, either by doing or
“ delaying to do their duty, to affect the right of other
“ persons, which can never be maintained; wherefore
“ the rule in all such cases is, that what ought to have
“ been done, shall be taken as done, and a rule so

(a) *Lechmere v. Earl of Carlisle*, 3 Peere Williams, 215.

“ powerful it is, as to alter the very nature of things ;
 “ to make money land, and on the contrary to turn
 “ land into money. Thus money articted to be laid
 “ out in land shall be taken as land, and descend to
 “ the heir ; and, on the other hand, land agreed to be
 “ sold shall be considered as personal estate.” And
 Lord Macclesfield (a), in considering a case where a
 sum of money had been devised to be laid out in the
 purchase of land, thus expresses himself:—“ If the
 “ purchase had been made, *it* [meaning the land] must
 “ have gone to the heir ; but if the trustee, by delaying
 “ the purchase, may alter the right and give it to the
 “ executors, this would be to make it the trustee’s will,
 “ and not the will of the first testator, which would be
 “ very unreasonable and inconvenient.”

The test, therefore, in these cases of conversion is not—Has the author of the trust expressly directed the property to be treated as converted, whether *de facto* converted, or not?—for in such a case there could be no doubt. Neither is the question to be answered—Has the property been in fact converted?—for that is immaterial. But the true question is—Has the author of the trust absolutely directed the real estate to be turned into personal, or the personal estate to be turned into real ?

Thus much for the general nature of the doctrine.

In passing to a more particular consideration, some doubt crosses one’s mind respecting the most con-

(a) *Scudamore v. Scudamore*, Precedents in Chancery, 543.

venient arrangement of the subject. In practice cases of conversion commonly arise either—

First.—Under wills; and, as respects these, either in reference to conversion of money into land, or land into money; or,

Secondly.—Under settlements, or other instruments *inter vivos*; and, as respects these again, either in reference to conversion of money into land, or land into money.

A consideration of the authorities in reference to what I may call this double twofold arrangement might be extremely instructive; indeed, I shall myself adopt a similar classification in reference to one portion of my Lecture. But this arrangement, although well adapted to show accurately the differences practically arising in the application of the doctrine, according as the instrument is a will, or one *inter vivos*, or the conversion is one of land into money, or money into land, is hardly so suitable for exhibiting the broad general principles of the doctrine as that which I purpose adopting, and which is as follows:—

1st.—What words are sufficient to produce a conversion.

2ndly.—At what time conversion takes place.

3rdly.—The general effects of conversion.

4thly.—The results of a total or partial failure of the objects and purposes for which conversion has been directed.

First.—What words will be sufficient to produce a conversion.

Here the principle is clear. You must find in the

instrument (be it will or settlement) a clear, imperative direction to convert—i.e., to lay out the money on land, or to sell the land for money.

There must be no option on the part of the trustee : for if we have an option, how can he be under any obligation ? How can it be said that *he ought to have* laid out the money on land, or sold the land for money ? What room is there, in fact, for the application of the maxim, that Equity considers that to have been done which *ought to have been done* ?

I will cite to you two cases in illustration of what I have just said, one as applicable to conversion of money into land, the other of land into money, viz., *Curling v. May* (a) and *Polley v. Seymour* (b).

The facts of the former of these cases, as shortly cited in a later one, were as follows :—

“ A. gives 500*l.* to B. in trust that B. should lay out
 “ the same upon a purchase of lands, or put the same
 “ out on good securities, for the separate use of his
 “ daughter H. (the plaintiff’s then wife), her heirs,
 “ executors, and administrators, and died in 1729. In
 “ 1731, H., the daughter, died without issue before
 “ the money was vested in a purchase ; the husband as
 “ administrator brought a bill for the money against
 “ the heir of H., and the money was decreed to the
 “ administrator, for the wife not having signified any
 “ intention of a preference, the Court would take it as
 “ it is found ; if the wife had signified any intention,

(a) Cited in *Guidot v. Guidot*, 3 Atkyns, 255 ; and see *Swann v. Fon-
 nereau*, 3 Vesey, 41 ; *Rich v. Whitfield*, L. R. 2 Eq. 583.

(b) 2 Younge & Collyer, Equity Exch. 708.

“ it should have been observed, but it is not reasonable
“ now to give either her heir or administrator, or the
“ trustee, liberty to elect; for Lord *Talbot* said, it was
“ originally personal estate, and yet remained so, and
“ nothing could be collected from the will as to what
“ was the testator’s principal intention.”

In the latter case, *Polley v. Seymour*, a testatrix devised the residue of her real and personal estate to W. S., his heirs, executors, and administrators, according to the different natures and qualities thereof, upon the trusts following, that was to say, “ upon trust to retain and keep the same in the state it should be in
“ at the time of her decease as long as he should think
“ proper, or to sell and dispose of the whole, or such
“ part thereof as and when he or they should from time
“ to time think expedient,” either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers; and then upon trust to invest the money to be produced by such sale or sales, together with all ready monies of the testatrix, in his or their own name or names, and in that of two of the residuary legatees thereafter named, in the public funds, or upon real or government securities. The testatrix then directed that the said W. S., his heirs, executors, or administrators should stand possessed of and interested in all such the general residue of her real and personal estate, and from and after such sale, then, of the stocks, funds, and securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay several

life annuities; and from and after full payment and satisfaction thereof, the testatrix directed that the said W. S., his heirs, executors, and administrators should stand possessed of all the said residue of her said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof should have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for five of the said annuitants (including the said W. S.), in equal shares and proportions, as tenants in common, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities thereof. The testatrix died, a suit was instituted for the administration of her estate, and the principal question for decision on further directions was, whether by the will of the testatrix the real estate was converted out and out. The point of the decision is contained in the following passage of the judgment of Mr. Baron Alderson :—"It seems to me that here the testatrix has bequeathed her real estate to the trustee with a discretion to sell or not to sell the whole or any part of it; and, consequently, that, until he exercises that discretion, the property remains in the state it was at the time of her death."

Here let me observe, that there are few doctrines of Equity more important to be borne in mind by every professional gentleman who sits down to pen either a will or a settlement than this doctrine of conversion. If he omit to do this, he runs great risk of leaving it doubtful on the face of the instrument, whether the subject-matter is to be treated as personal estate or

real estate. Nor is this a point on which a mere *passive* recollection is sufficient. The draftsman, in order to avoid confusion, must have his attention actively directed to the doctrine. Take as an illustration a settlement. The main point in every well-drawn settlement is to impress distinctly on all the property comprised in the same set of limitations or trusts a clearly defined character either of real or of personal estate, and this wholly without regard to what the property itself is truly and in fact. Thus, suppose it is intended that the settlement shall be a money settlement—then if land constitute part of the subject-matter settled, the land is conveyed upon an absolute trust for sale, and the proceeds of sale are settled. So if the settlement be of land, with limitations applicable to landed property, and the subject-matter consist partly of personal estate, care is taken to impress that personal estate with the real estate limitations.

Again, throughout the respective settlements the utmost pains are taken to preserve in the first case the character of personalty, in the latter the character of land. Thus in the ordinary power contained in money settlements to invest in land, the very first trust of the land bought always is to resell, and the character of personal estate is thus carefully impressed upon the land purchased. Similarly the provisions in real estate settlements for temporary investment in the public funds, or on mortgage, are carefully so worded as to impress upon the temporary investment the quality of land. In truth one of the distinctive

features of a well-drawn settlement is a careful preservation to the property of one uniform quality,—*i.e.*, always real estate, or always personal estate. Nothing is left uncertain, nothing left to the option of any party in this respect.

But to return to the question under discussion, *viz.*, What words will effect a conversion? I said the trust or direction to convert must be imperative. There must be no option. This proposition should be qualified by the statement that where the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance has been deemed sufficient to outweigh any semblance of option. The decision in *Earlom v. Saunders* (a) supports this proposition.

In that case, William Powell by his will devised land to his wife for life, with remainders over, with remainder to W. and P. as tenants in common in fee. He directed his executrix to pay 400*l.* to his trustees, to be laid out in the purchase of land, *or* on any other security or securities as his trustees should think proper and convenient; and directed the lands and securities to be settled on the trustees in trust for his wife for life, and after to such uses, and under such provisions, conditions, and limitations as the land before devised. The intermediate limitations being at an end, and W. being dead, the estate came to P., an infant of the age of twenty, who made a will, and gave all his estate to the plaintiff; and afterwards

(a) Ambler, 241.

died under age. The question was, whether the 400*l.* which had not been laid out on land, could be considered as money, in which case P.'s will being good, under the then existing law, as a will of personal estate, the plaintiff would have been entitled to it; and it was argued for the plaintiff, that the trustees had a discretion to invest on land or on securities; but Lord Hardwicke, relying on the circumstance that the limitations were exclusively applicable to real estate, held, that the discretion to invest on securities must be confined to an intermediate investment until purchase of lands, and that the 400*l.* was real estate.

Secondly.—As to the time from which conversion shall be deemed to take place.

It is obvious that, in all cases of this kind, the terms of the instrument itself must be our guide. Thus, if there be a trust to sell upon the happening of a particular event which may or may not happen, clearly the conversion takes place only as from the time of the happening of that event, though of course the moment the event occurs the conversion takes place just as if there had been an absolute direction to sell at that time.

The case of *Ward v. Arch* (a) well illustrates the principle. There a testator gave all his estate and effects of what nature, kind, or quality soever, after payment of his debts, and funeral and testamentary expenses, to trustees, their heirs, executors, &c., in

(a) 15 Simons, 389.

trust, in case there should not be sufficient to pay the annuity thereafter given to his wife, to sell all his real and personal estate, and invest the proceeds in the funds, and out of the dividends or the rents of his real estate, until the same should be sold, to pay his wife an annuity of 300l. The testator left no residuary personal estate, and the rents of his real estate were not nearly sufficient to pay his wife's annuity, but the real estate in fact remained unsold long after her death. The question was, whether the real estate was to be considered as absolutely converted into personalty. The Vice-Chancellor of England held, that it was, expressing himself thus: "This case
" must be decided in precisely the same way as it
" would have been if a suit had been instituted, shortly
" after the testator's death, for the administration of
" his estate, and it appeared that the income of his
" real and residuary personal estate was not sufficient
" to pay the annuity. It is quite plain from the words
" of the will, that the trust for sale would have
" arisen as soon as that fact was ascertained, and the
" Court must have directed it to be carried into effect
" immediately."

So, in cases like that of *Polley v. Seymour* just referred to, where, up to a particular time, it is wholly in the discretion of a trustee whether the property shall or not be sold, the conversion takes place as from the time of sale.

Subject, however, to the general principle that the terms of each particular instrument must be considered in reference to this, as indeed to every other question

of construction arising upon them, the rule may be said to be, that in regard to wills, conversion takes place as from the death of the testator, and in regard to deeds or other instruments *inter vivos*, as from the date of execution; and this, although the author of the trust may, upon the face of the instrument, contemplate the possibility of a postponement of the actual conversion of the property from considerations of convenience.

Thus if a testator by his will devises his real estate to trustees upon trust *with all convenient speed* to sell and dispose of such estate, and then proceeds to dispose of the produce of sale, nothing can be clearer than that, notwithstanding the power (nay, the duty) of the trustees to postpone the sale until an advantageous opportunity of selling shall occur; yet, as between the heir and personal representative of any person taking an interest in the proceeds, there is a conversion out and out, as from the date of the death of the testator.

As regards the time as from which, in the absence of special circumstances, conversion is to take place in the case of "a deed," I cannot do better than read to you the observations of Vice-Chancellor Wigram, in the case of *Griffith v. Ricketts* (a):—

"A deed differs from a will in this material respect: "the will speaks from the death, the deed from delivery. If, then, the author of the deed impresses "upon his real estate the character of personalty, that, "as between his real and personal representatives,

(a) 7 Hare, 299, see p. 311.

“ makes it personal and not real estate from the
“ delivery of the deed, and consequently at the time
“ of his death. The deed thus altering the actual
“ character of the property, is, so to speak, equivalent
“ to a gift of the expectancy of the heir-at-law to the
“ personal estate of the author of the deed. The
“ principle is the same in the case of a deed as in
“ the case of a will; but the application is different,
“ by reason that the deed converts the property in
“ the lifetime of the author of the deed, whereas, in
“ the case of a will, the conversion does not take place
“ until the death of the testator; and there is no
“ principle on which the Court, as between the real
“ and personal representatives (between whom there
“ is confessedly no equity) should not be governed by
“ the simple effect of the deed in deciding to which of
“ the two claimants the surplus belongs.”

This rule received a strong application in the case of *Clarke v. Franklin* (a). There a settlement was executed of real estate by deed (not enrolled) to the use of the settlor for life, with remainder (subject to a power of revocation which he never exercised) to the use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at the settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed

(a) 4 Kay & Johnson, 257.

the proceeds of land to be applied for charitable purposes; and the question was, whether, under these circumstances, the surplus belonged to the heir, or to the next of kin, of the settlor. Vice-Chancellor Wood, founding himself upon a previous decision of Lord Thurlow (a), held that, notwithstanding the trust for sale was not to arise until after the settlor's death, the property was impressed with the character of personalty immediately upon the execution of the deed, and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty.

The Vice-Chancellor, in his judgment, after referring to Lord Thurlow's decision, in which the case was one of conversion of land into personalty, continued thus :—

“ The doctrine of the converse case of personalty directed by deed or will to be converted into land, is fully discussed by Lord Eldon in *Wheldale v. Partridge* (b), where, upon the special terms of the instrument, it was held not to be one which upon its execution clothed the property with real uses; but Lord Eldon said, that, but for those special provisions, and if there had been nothing more in the deed, the ‘ property would, *immediately upon the execution of the deed*, have been impressed with ‘ real qualities and clothed with real uses, and the ‘ money would have been land ;’ clearly recognising the rule that conversion takes effect from the moment

(a) *Hewitt v. Wright*, 1 Brown's Chancery Cases, 86.

(b) 8 Vesey, 227.

“ of the execution of the deed ; and the rights of the
 “ parties, and the character in which the property is
 “ taken by them, are to be determined according to
 “ that conversion.

“ The principle of these authorities is, therefore,
 “ clearly settled : and where, as here, real estate is
 “ settled by deed upon trust to sell for certain speci-
 “ fied purposes, and one of those purposes fails, there,
 “ whether the trust for sale is to arise in the lifetime
 “ of the settlor or not until after his decease, the
 “ property to that extent results to the settlor as per-
 “ sonalty from the moment the deed is executed.”

But while thus admitting the general doctrine that in the case of a deed conversion takes place as from the date of execution, we must be careful how we apply it to instruments, such as mortgage deeds, where the general intention of the author of the trust is not conversion, but merely the raising of money.

Thus take the case of *Wright v. Rose (a)*.

There Joseph Wright, being seised in fee of a freehold estate, borrowed 300*l.* from James Rose, the defendant, and secured the repayment of it, with interest, by executing a mortgage deed of the estate, with a power of sale, and by the terms of the deed it was provided that the surplus monies to arise from the sale, in case the same should take place, should be paid to Wright, his executors or administrators.

In 1822 Wright died intestate, and without ever having been married. All the interest due on the

(a) 2 Simons & Stuart, 323.

mortgage money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, Rose the mortgagee entered into possession, and afterwards sold the estate under the power of sale, for a sum which considerably exceeded the mortgage money and interest. The question was whether the surplus purchase - monies were real or personal estate.

The judgment of Sir John Leach was in the following words:—

“If the estate had been sold by the mortgagee in
“the lifetime of the mortgagor, then the surplus
“monies would have been personal estate of the
“mortgagor, and the plaintiffs would have been
“entitled. But the estate being unsold at the death
“of the mortgagor, the equity of redemption de-
“scended to his heir, and he is now entitled to the
“surplus produce.”

Here the point which created the difficulty was that the ultimate limitation of the proceeds was to the mortgagor, his executors and administrators. And it was contended that this was equivalent to an express conversion in the event of the power of sale being exercised. If that intent could have been collected, then certainly the circumstance that the power of sale was exercised after the death of the mortgagor ought, according to the cases just referred to, to have carried no weight; but the true ground of decision, it is conceived, was the general nature of the transaction, viz., that it was a mortgage, and that it is no part or

office of a mortgage to alter the order of devolution of property (a).

To the same ground must be referred the decision of the late Vice-Chancellor Wigram in the case of *Bourne v. Bourne* (b). There B. being seised in fee of real estate, the same was, upon the occasion of an advance of money to him, conveyed to a trustee, in trust to permit B. to receive the rents and profits until the loan became payable, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to B., his heirs and assigns, but if default should be made in payment, then that the trustee should enter into possession of the premises, and at his discretion sell the same, and pay over the residue or surplus (after the payment of the debt, interest, and costs) to B., his heirs, executors, administrators, or assigns. Default was made in payment, but no sale of the estate took place until after the death of B., who devised it to the plaintiff for life, with remainder over in tail: It was held that there was no conversion, but that the surplus proceeds passed by the devise as real estate.

Of the soundness and good sense of these decisions one can feel little doubt. At the same time I wish

(a) See the recent decision of *Jones v. Davies*, 8 Ch. D. 205, in which A. B. and his wife, in exercise of an absolute power of joint appointment vested in them, executed a mortgage with a power of sale which provided the surplus monies arising under the exercise of the power should be paid to A. B., his heirs, executors, administrators, or assigns, and in which the surplus proceeds arising from a sale after the death of A. B. were held to belong to his personal representative.

(b) 2 Hare, 35.—See and distinguish *In re Underwood*, 3 Kay & Johnson, 745.

you to observe that in the latter case Vice-Chancellor Wigram rather lays stress upon the circumstance that the mortgagee's trustee had merely a discretion to sell, which he did not exercise until after the mortgagor's death, and that in consequence of this circumstance the proceeds belonged to the mortgagor's heir.

It is difficult to reconcile this view with an extremely anomalous and unfortunate class of decisions which I am now about to bring to your notice—I mean those, of which the principal are, *Lawes v. Bennett* (a) and *Townley v. Bedwell* (b).

The facts of the former case are concisely stated by Lord Eldon, in giving judgment in the latter.

The material facts of *Townley v. Bedwell* were these: A lease had been executed by the testator in the cause to Townley for thirty-three years, with a proviso that, if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, 600*l.* for the purchase, upon having a good title made to him, Townley, his executors, administrators, or assigns. The testator died before the expiration of six years from the date of the lease. After his death, and within that period Townley declared his option to purchase according to the proviso; and it was held that the purchase-money belonged to the personal representative.

The danger of these decisions is manifest. If an

(a) 1 Cox, 167; see also, 14 Vesey, 596.

(b) 14 Vesey, 592.

option of this kind can alter the entire quality of property after the lapse of two years, it may do so after a lapse of ten or fifteen; and during the whole of that time the rights of the next of kin and of the heir-at-law may be left in an uncertain and precarious state, dependent in fact on the option of a third party.

This in truth was what actually occurred in the recent case of *Collingwood v. Row* (a), in which, by an agreement dated 21st March, 1839, an option to purchase was conferred, and it was held that this option, when exercised fourteen years afterwards, in 1853, operated to convert real estate into personalty. The general dislike of owners of land to confer optional rights ranging over long periods, must no doubt render cases of this description rare; but it is difficult to exaggerate the inconvenience of the doctrine, and it is much to be regretted that the rule should not have been adopted of treating the property over which the option may extend as land subject to the option.

You may, I think, take for granted that the doctrine of *Lawes v. Bennett* will receive no extension (b), it having been disapproved more or less by almost every judge under whose consideration it has come, even by those who have followed it; but, in principle, the distinction is extremely thin between cases of this class, and those where property is vested in a mortgagee,

(a) 3 Jurist (N.S.), 735.

(b) Accordingly, where an option of purchase is conferred and subsequently exercised, the Court will not, *as between the vendor and purchaser*, imply a conversion as from the date of the contract conferring the option; *Edwards v. West*, 7 Ch. D. 858.

subject to a power of sale—that is to say, subject to an option—under which he has right to sell the property and convert it into money.

Thirdly.—As to the effects of conversion.

These have been generally stated to be, to make personal estate real, and real estate personal.

Thus, take money to be laid out on land.

(a.) It was, of course, descendible to the heir.

(β.) Again, when property of this description belonged to a married woman, her husband was entitled to an estate by the curtesy out of it (a).

(γ.) Again, under the old law, land was not liable to simple contract debts; and in the old cases *dicta* are to be found that money covenanted to be laid out in the purchase of land, stood on the same footing as land, and was not liable to simple contract debts (b). On the other hand, an interest of this kind was, in Equity, subject to a judgment debt, just in the same way as the land itself (c).

(δ.) Again, before Lord Langdale's Act (the Wills Act), an infant under the age of twenty-one (how early may be matter of doubt, but certainly at seventeen years old) might make a will of personal estate. Well, when an infant was absolutely entitled to money liable to be laid out in the purchase of land, he could

(a) See *Sweetapple v. Bindon*, 2 Vernon, 536.

(b) The operation of this rule, if understood as applying in all its breadth, would be of the strongest kind. A man might die entitled in law to 1000*l.* cash, yet, because it was liable to be laid out in the purchase of land, his heir would, under the old law, take it free from any obligation to pay simple contract debts.

(c) *Frederick v. Aynscombe*, 1 Atkyns, 392.

not by will dispose of it during his minority. This was assumed in *Earlom v. Saunders* (a), just now referred to.

(ε.) So I apprehend (though I am not aware that the point has ever been distinctly decided) money liable to be laid out on the purchase of land could not, before the late Wills Act, have been devised by an unattested will. The will must, I conceive, have been executed with the formalities required by the Statute of Frauds. Certainly money of this kind would not pass by a will professing to deal only with personal estate (b).

So as to land absolutely directed to be sold, it is, as between all persons claiming under the author of the trust, to all intents and purposes, personal estate.

It seems necessary to qualify, in the words just used, the statement of the operation of the doctrine of conversion, it having been held, in certain cases, that persons not claiming in any way under the author of the trust, cannot invoke its aid (c). Thus, where land has been conveyed upon trust for sale, and to pay debts, and stand possessed of the residue upon trust for the settlor *as personal estate*, and before sale the settlor has died, it has been held that probate duty is

(a) Ambler, 241.

(b) Gillies v. Longlands, 4 De Gex & Smale, 372.

(c) This qualification may now be regarded as unnecessary. According to the latest decisions (*Attorney-General v. Brunning*, 8 House of Lords Cases, 265; *Forbes v. Steven*, L. R. 10 Eq. 178; *Attorney-General v. Lomas*, L. R. 9 Exch. 29) the anomalous exception commonly supposed to have been established by *Matson v. Swift*, 8 Beavan, 368, and *Custance v. Bradshaw*, 4 Hare, 315, does not exist.

not payable upon the settlor's interest in the surplus proceeds of the unsold lands. The result of the trust for sale, it is considered, is merely to create an equity as between the real and personal representative, and the Crown has no right, for merely fiscal purposes, to say that what is in fact real estate shall be deemed to be personalty (*a*).

Fourthly.—I proceed now to the last head of my lecture,—viz., the results of a total or partial failure of the purposes for which the conversion is directed.

In the consideration of this branch of the subject, it will be more convenient to consider separately each of the four classes of cases adverted to at the outset of my lecture,—*i.e.*,

1st.—Cases arising under wills, and separately in respect of these—

(*a*.) Cases of conversion of land into money; and

(*β*.) Cases of conversion of money into land.

2ndly. Cases arising under settlements or instruments *inter vivos*, with a similar subdivision.

1.—(*a*.) And first, as regards wills, and as to cases of conversion of land into money.

Take a simple case. A testator devises all his real estate to trustees, upon trust to sell and divide the

(*a*) *Matson v. Swift*, 8 Beavan, 368. So it was held, that the Crown could not claim by forfeiture a felon's share of proceeds of real estate, unless actually converted; *Thompson's Trusts*, 22 Beavan, 506. But see the last previous note. And as respects forfeiture, the student should bear in mind that forfeiture for treason and felony have been recently abolished by the 33 & 34 Vict. cap. 23, which contains detailed provisions for the management and application of the property of convicted persons.

proceeds of sale equally between A. and B. What is the result when A. and B. both die in the testator's lifetime? and what when one only of them (say A.)? In the first case, you observe, the purposes for which the conversion was directed fail *totally*: A. and B. are both dead. The whole object of the conversion is at an end. In the second they fail *partially* only; because B., one of the two legatees, has survived, and is entitled to have the land sold, and to receive a moiety of the proceeds. In each case there is a lapse. In the first case, the whole land is undisposed of by the will; in the second, one moiety of the proceeds of sale is undisposed of.

Under these circumstances, two principal questions arise,—viz.,

First.—To what extent is the trust for conversion still in force?

Secondly.—Who is to benefit by the lapse—the heir or the personal representative?

Where *both* A. and B. are dead, both these questions admit of a ready answer. For since both A. and B. are dead, the whole purpose and object of the testator in directing a conversion has failed. The conversion was directed simply with a view to the division of the proceeds, and there being no one to receive any share, the matter is in the same position as if no trust to sell had ever been inserted in the will, and the land descends to the heir.

Of course you must understand me as putting a simple case of trust to sell and pay half of the proceeds to A., and the other half to B. If any other trust

attached upon the proceeds, say a trust for payment of debts and legacies, and there were debts *or* legacies to be paid, then the case would no longer be one of total failure of the purposes for which the conversion was directed ; but it would fall within the same principle as the case now next to be considered, viz., where A. alone dies.

Next, then, how does the matter stand when A. alone dies ? Here the trust for conversion still subsists, for without its exercise, B., the survivor, cannot receive his moiety of proceeds: the other moiety therefore is, by virtue of the will, a moiety of personal estate. To whom then shall this lapsed moiety, which by the doctrine of conversion is personal estate, belong ? To the heir, or to those entitled under the will to the personal estate ?

This was the question in the great case of *Ackroyd v. Smithson* (a), in which, according to tradition, Lord Eldon earned his earliest laurels, by establishing that the right, under these circumstances, was with the heir, and not with those entitled to the personality.

It seems, indeed, impossible to deny the validity of the heir's right. The testator has, it is true, directed the land to be sold, and it still must be sold, but that is for the purpose of giving B. his moiety of proceeds. But where on the face of the will can you discover any trace of intention to give the other moiety of proceeds to the next of kin ? The next of kin take the testator's personal estate by "act of law," but they can take

(a) 1 Brown's Chancery Cases, 502.

his real estate, or the proceeds of his real estate, as legatees only, and by virtue of some intention to that effect on his part. It is, however, clear that the testator never meant to give *them* anything.

The result therefore is, that, as between the heir and next of kin, the former will take A.'s moiety of proceeds. As between the heir-at-law and a residuary legatee the result may occasionally be different, as in cases where a testator shows an intention that the proceeds of sale shall, for all intents and purposes, be deemed part of his personal estate (*a*).

Neglecting, however, any such special claim founded on the peculiar frame of any given will, the result may be thus summed up:—

When the trust for conversion fails wholly, the heir takes the land as real estate.

When the trust for conversion fails partially, the heir takes the share of proceeds but as personal estate (*i.e.*, it would go to his, the heir's, personal representative or next of kin).

In *Smith v. Claxton* (*b*) you will find each of these cases very well illustrated.

1.—(*β*.) Next, as regards the case of a will, and of money directed to be laid out in the purchase of land.

Singularly enough, it was for a long time doubtful upon the authorities whether, in the case of a testator bequeathing a sum of money to be laid out in the purchase of land, to be settled upon trusts, which failed

(*a*) See Lewin on Trusts, 128-130 (5th ed.), 140-142 (6th ed.).

(*b*) 4 Maddock, 484; and see *Jessopp v. Watson*, 1 Mylne & Keen, 665.

wholly or partially, the heir had not an equitable right to the lapsed interest in the money so bequeathed.

It was, in fact, reserved for Lord Cottenham to set this question definitely at rest by deciding that the analogy of the cases with regard to conversion of real estate into personal held perfectly, and that the money fund, on failure of the trusts respecting the real estate, went to the next of kin or residuary legatee. I allude to the case of Cogan v. Stevens (a), where a testator gave a sum of 30,000*l.* to be laid out on land which was to be settled on various relatives in succession, with an ultimate trust for a charity. The money was never laid out, and all the valid trusts having failed or expired, and the trust for charity being invalid, the question arose who was entitled to the 30,000*l.*? and Lord Cottenham decided that it fell into the residue of the personal estate (b).

2.—Let us now take the case of a total or partial failure, where the trust for conversion is created by settlement or other instrument "*inter vivos*," and adopt the same order as that pursued in regard to wills.

2.—(a.) And first in reference to a conversion of land into money. Suppose, for instance, a conveyance

(a) 5 Law Journal (N.S.), Chanc. 17.

(b) This decision was followed by Lord Hatherley (when V.-C. Wood) in *Reynolds v. Godlee*, Johnson, 536, see p. 582. And it is now settled (overruling *Reynolds v. Godlee* on that point) that where personal estate is bequeathed upon trust for conversion into land to be held upon trusts which ultimately fail, land purchased before the failure of the trusts is taken by the next of kin as real estate, and passes as such to the real representative of such next of kin, *Curtis v. Wormald*, 10 Ch. D. 172.

of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and *after his death* to sell and pay one moiety to A., if then living, and the other moiety to B., if then living. Now, how will the case stand if both A. and B. die in the settlor's lifetime? And how will it stand if A. alone so die?

At first, I think, it might strike you that this is the same identical case as that first put with reference to a will, but it is only up to a certain point that it runs on all fours.

As regards the question of conversion the cases are exactly parallel. Where A. and B. both die, the trust for conversion fails altogether. Where A. only dies, it still subsists, a sale being still requisite for the purpose of giving B. his moiety of proceeds.

But as to the person who is to reap the benefit of the death of the *cestuis que trust*, there is a material distinction. Where both A. and B. die, and the trust for conversion is gone altogether, the heir will of course (as in the case of the will) take; for the land, there being no trust to convert, still remains land. But where A. alone dies, the case is no longer similar to that arising under a will. There is now, as shown, a valid trust for conversion. What remains undisposed of by the deed is a moiety of the proceeds of sale. This is personal estate. When did it become so? According to the rule given in the earlier part of the Lecture, the answer is, at the date of the execution of the deed of settlement, and not merely when the trust for sale arose. The settlor, therefore, *in his lifetime*, took immediately on A.'s death, by way of

resulting trust, this moiety of personal estate, and it forms part of his general personal estate, and must devolve as such.

This was the true point of the decision in *Clarke v. Franklin* (a) already discussed. There the conveyance was by deed. The first trust was for the settlor for life; next came a trust to sell, then a trust to pay certain small sums (which was a *valid trust*), and all the remaining trusts were for charity and invalid. The result was, that, immediately upon execution, the property was impressed with a valid trust for conversion, and, simultaneously, the settlor took under the deed, by way of resulting trust, and as personalty, so much of the proceeds of sale as was invalidly given to charity.

2.—(β.) The only remaining case is that of a conversion of money into land by settlement; and here too the analogy is perfect. Thus a man on his marriage covenants to pay 1000*l.* to trustees, to be laid out on land, to be settled to the use of himself for life, remainder to the use of his wife for life, remainder to the children of the marriage, remainder to his own right heirs.

Now, suppose first that his wife dies in his lifetime without issue. Here all the uses of the land, except for the benefit of the settlor himself, are gone. The purposes of the trust for conversion are at an end altogether. The money is, as the phrase is, at home in the settlor's pocket; there is no obligation on his

(a) 4 Kay & Johnson, 257.

part to lay it out, and no room for the application of the maxim, that Equity considers that done which ought to have been done — for the settlor could be under no obligation to himself or his heir (a).

But if, on the other hand, the wife had outlived the husband, were it only for a week, then the trust had not wholly failed, then there was an obligation to pay the 1000*l.* to be laid out on land, then Equity will consider that done which ought to have been done, and will, at the suit of the heir of the settlor, order the money to be laid out or paid to him (b).

(a) *Pulteney v. Darlington*, 1 Brown's Chancery Cases, 223.

(b) *Lechmere v. Lechmere*, Cases *temp.* Talbot, 80.

CONVERSION—LECTURE II.

THE task which I propose to myself this evening is to complete, as far as I am able, the general sketch of the doctrine of *conversion*, which I commenced when we last met.

On that occasion I endeavoured to explain—

(1.) What language was sufficient to produce a conversion.

(2.) The time as from which conversion took place.

(3.) The effects of conversion.

(4.) The results of a partial or total failure of the purposes of conversion.

My treatment of the subject was necessarily not very minute or detailed, yet still, I trust, sufficiently so to convey the general principles of the doctrine; and it is not my intention, on the present occasion, to enter with any great minuteness upon the points then discussed. My chief object now is to touch upon a few questions intimately connected with the general doctrine as then explained, yet admitting of a distinct consideration—to add, if I may be allowed the metaphor, the necessary offices and appurtenances to the main building which I attempted to construct at our

last meeting. This I shall do under two principal heads, viz.:

(I.) Conversion by title or authority paramount.

(II.) Reconversion.

And, first, as to conversion by title or authority paramount.

You will remember that in every instance selected on the previous occasion for the purpose of illustrating the working of the doctrine, the question, whether in contemplation of Equity there was or was not conversion, was referred ultimately to the intention of the "author of the trust" as discoverable from the instrument of trust itself. The illustrations chosen were those arising either upon some will—and then the question was, had the "testator" on the face of the will shown an intention to convert out and out—or upon some settlement or other instrument "*inter vivos*;" and then a similar question arose as to the intention of the "contracting parties." The continually recurring elementary question was in substance this: Has the author of the trust said that the land shall at all events be sold and turned into money? or, on the other hand, Has he said that the money shall at all events be laid out in land? And in each case, as I pointed out, assuming the answer to be in the affirmative, a Court of Equity holds that no accidental delay in effecting the intentions of the author of the trust shall vary the rights of parties. The Court treats as done that which ought to have been done, and views the land as money, or the money as land, in accordance with the positive directions of the testator or settlor.

I have thought it right thus to recall to you the leading features of the general doctrine of conversion in order to bring into more salient prominence the difference between these and those of the subject first selected for consideration this evening, viz.: “Conversion by title or authority paramount.”

By this phrase I mean to characterize those cases in which, without any wish or intention of the owner of property, its actual nature becomes, by the exercise of some legal paramount authority, changed from real estate to personal, or from personal estate to real. I shall not be able to refer to any instances in which the question has arisen with reference to a change from personal estate to real, but the principle would obviously be the same in either case.

The leading instances of conversion by authority paramount will, I think, be found to range themselves under one of the three following heads:—

- 1.—Conversion by Act of Parliament, as, for instance, where, under the authority of some railway or other Act, real estate is taken from the owner for a money consideration.
- 2.—Cases under the jurisdiction in Bankruptcy, where the real estate of the bankrupt is sold to pay his creditors.
- 3.—Sales under the jurisdiction in Chancery, where real estate is sold to pay debts or charges thereon.

In each of these cases the Legislature, or the Court of Bankruptcy, or the Court of Chancery, takes the property of the landowner, and by an authority alto-

gether superior to his wishes or intentions converts it de facto into money. And under these circumstances questions frequently arise respecting the extent to which this conversion operates as between the real and personal representative of the original owner.

Thus, as you see, the question here is *not*, Is the property, though not converted, to be treated as converted? but, Is it, though *de facto* converted, to be treated to any and what extent as not converted? The question is of a converse kind to that discussed on the occasion of our last meeting.

1.—Taking, first, cases of conversion by Act of Parliament, the simple point as to these is, what is the intention of the statute? The power of the Legislature is one to which all Courts must succumb. No rule of Equity can vary the expressed intention of an Act of Parliament; the question is, What has the Act said?

Yet even here, it may perhaps be laid down as a sound principle of construction, that Acts of Parliament authorizing the property of private individuals to be taken for public purposes, ought to be construed so as to vary as little as possible the rights of third persons, and not to be extended beyond their main object. The main object of the Legislature is to acquire the land for purposes of supposed public benefit, not to change the quality of the property.

Subject, however, to this general principle of construction, the will of the Legislature, of which it has been said that it can do almost anything—short of making a man a woman, or a woman a man—is the sole guide.

The case of *Richards v. Attorney-General of Jamaica* (a) affords a good illustration of the powerful operation of conversion by Act of Parliament.

A testator resident in Jamaica, and seised of plantations and slaves in the Island, by his will, dated June, 1834, after giving certain bequests, proceeded as follows:—"Also I give, devise, and bequeath, share
" and share alike, unto Rosanna Richards and her
" children, all my right, title and claim to compensa-
" tion, such as may be awarded to me, as my portion
" of the compensation fund, for the emancipation of
" such slaves as may belong to me, and be living, on
" the 1st of August, 1834." This will was not attested so as to pass real estate; but was properly executed to pass personalty. By the law of Jamaica, slaves could only be devised by a will executed with the formalities requisite in the case of real estate. The Act for the abolition of slavery (3 & 4 Will. 4, c. 73, passed on the 28th of August, 1833) provided that, on the 1st of August, 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to a money compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The Court in Jamaica decreed, that the compensation money partook of the nature of real estate to the same extent as the slaves, and did not pass under the will. The Judicial Committee of the Privy Council, however, upon appeal, decided that (treating the slaves as real estate) the Legislature became pur-

(a) 6 Moore's Privy Council Cases, 381.

chasers, under 3 & 4 Will. 4, c. 73, from the date of the Act, the vendor retaining a limited interest in the slaves for a term of years, and that the money to be received under the compulsory sale of the slaves was personal estate, and passed to Rosanna Richards and her children as specific legatees under the will.

But while acknowledging the absolute necessity of making the very words of the Act of Parliament our guide in questions of this class, it is, notwithstanding, possible to attempt some general classification of the cases arising under the Acts of Parliament authorizing the taking of lands for public purposes, and more especially under the "Lands Clauses Consolidation Act, 1845" (a), an Act which is almost invariably incorporated into recent Acts authorizing the expropriation of land.

The persons whose land is thus forcibly taken from them may commonly be ranged under one of the three following heads :—

- a. Persons who, being absolutely entitled, submit to the compulsion put upon them, and contract for the sale of their land.
- β. Persons who, though absolutely entitled, will not so submit.
- γ. Persons under disability, or persons having only limited interests the land being in settlement.

a.—In the first case, viz., that of a person absolutely entitled but contracting, though under compulsion, for

(a) 7 & 8 Vict. c. 18.

the sale of land, the case is pretty clear. Induced by the pressure of the Act of Parliament he sells his land—he becomes a party to its conversion; and the purchase-monies, though not actually paid at the date of his death, are to all intents and purposes personal estate (a).

β.—Where the person absolutely entitled refuses to concur in effecting the sale and receiving his purchase-money, the Legislature has provided means for acquiring the property in despite of his resistance; and the purchase-money is (under the 76th clause of the Lands Clauses Consolidation Act) paid into the Bank of England under such circumstances as to effect a conversion out and out,—*i.e.*, the purchase-money is personal estate (b).

γ.—Where the land purchased is in settlement, or where the owner is an infant (c), or a lunatic (d), the purchase-money is paid into Court under the 69th

(a) See *Ex parte Hawkins*, 13 Sim. 569.

(b) But a mere notice to treat, followed by the death of the landowner, without either contract or the exercise of the compulsory powers of the Act, is insufficient to effect a conversion; *Haynes v. Haynes*, 1 Drewry & Smale, 426.

(c) See *Kelland v. Fulford*, 6 Ch. D. 491.

(d) The decision in *Ex parte Flamank*, 1 Simons (N.S.), 260, must be viewed as resting on its own special circumstances. The property, though belonging to a lunatic, was taken by the company under the statutory powers conferred as against resisting landowners.

As respects land sold under the statutory jurisdiction in lunacy, it is to be observed that the proceeds of sale are, by the statute, carefully impressed with the nature and quality of the land sold; see 16 & 17 Vict. c. 70, s. 119; *Re Wharton*, 5 De Gex, Macn. & Gor. 33. So also land sold under the provisions of the Partition Act, 1868; see *Foster v. Foster*, 1 Ch. D. 588; *Mildmay v. Quicke*, 6 Ch. D. 553.

section of the Lands Clauses Consolidation Act; and it is by the express direction of the Act liable to be laid out again on the purchase of land, subject to provisions for an intermediate investment on Government Stock; and the money is therefore, in the eye of a Court of Equity, land.

In a recent case (*a*), Vice-Chancellor Kindersley thus summed up the decisions:—"It appears then, upon the authorities, that when the circumstances of the case have brought it under the 69th section of the Lands Clauses Consolidation Act, the money has been held to bear the character of realty; but if, on the other hand, the circumstances have brought the case under the 78th section of the Lands Clauses Consolidation Act, then the money has been held personalty."

The general result of these Acts may then be said to be, that when an owner is "*sui juris*" and absolutely entitled, a conversion is intended to be effected: and this seems not unreasonable, for he can himself regulate the interests *inter se* of his real and personal representatives. Where, on the other hand, the owner is not *sui juris* or the property is in settlement, then the quality of the property is not intended to be altered, and the money stands in the place of the land *as land*.

2.—Next as to conversion under the paramount authority conferred by the Bankruptcy Laws.

The case, decided in 1821 by Sir John Leach, of

(*a*) Harrop's Estate, 3 Drewry, 726, see p. 733.

Banks v. Scott (a), may be usefully referred to upon this point.

In that case *Scott, Nicholson, and Smith* carried on business as bankers in partnership, and were interested in the profits and losses in various proportions. A commission of bankruptcy was awarded against them, and the full amount of the joint and separate debts of the bankrupts with interest was paid. To complete such payment, real estates of great value belonging to the bankrupt *Scott* were sold, and on the whole, *Scott* contributed upwards of 46,000*l.* beyond his proportionate share of the losses of the firm. Parts of the estate were sold during the life of *Scott*: parts were contracted to be sold, but not sold at the time of his death, and the remainder were sold after his death, and a surplus remained in the hands of the assignees. The question was, what were the rights of the heir of *Scott* in respect of the surplus produce of sale of the estates sold under the bankruptcy? Sir John Leach in his judgment expressed himself thus:—

“As to the real estate sold or contracted to be sold during the life of the bankrupt *Scott*, it must at his death be considered as converted into personalty: but as to the real estate which was unsold and uncontracted for at the death of the bankrupt, it is to be considered as descending to his heir, subject to the charge created by the provision of the Bankruptcy laws for the payment of his debts. It can

(a) 5 Maddock, 493.

“ make no difference in principle, whether such a
 “ charge be created by the provision of the law or
 “ the provision of the party. As far as the real estate
 “ is not exhausted by that charge, it is the property
 “ of the heir.”

The question, whether even the surplus proceeds of real estate sold in the bankrupt's lifetime might not have been held to be real estate, seems hardly to have been argued; and it may be doubted whether, according to the principle of the next decision to which I shall refer, the point might not have been successfully pressed.

3.—As to conversion by the Court of Chancery. Where landed property is subject to debts and charges, say, where a landowner dies indebted, testate or intestate, the Court, as you are aware, has power to sell his land for payment of his debts. But obviously it is impossible so exactly to measure the quantity of land required for payment of debts as not in some degree to sell more than necessary. A question then arises, what is the character of the surplus proceeds? Real estate or personal. This point is covered by the decision in *Cooke v. Dealey* (a).

In that case the testator, Samuel Cooke, directed that ~~all his debts should be paid by his executors out of his personal estate. He devised his real and personal estate to his wife for life, and after her decease~~

(a) 22 Beavan, 196. See as to this case note (a) at p. 365 *infra*. The student may also with advantage read and consider the cases arising upon the felling and sale of timber, of which *Dyer v. Dyer*, 34 Beavan, 504, is one of the most recent.

he bequeathed 1000*l*. to the plaintiff, and, subject thereto, he devised and bequeathed one fourth of his real and personal estate to his daughter, Eliza Dealey, and the rest to other persons.

The testator survived his wife and died in 1851.

A suit was instituted for the administration of the estate, to which Eliza Dealey and her husband were parties. By the decree, the usual accounts were directed, and the real estates were ordered to be sold for the payment of the debts and legacies; and they were sold accordingly. Subsequently to the decree and to the sale, Eliza Dealey fell into a state of mental imbecility, and the estates, in consequence, were vested in the purchasers under the Trustee Act. Eliza Dealey died, and in April, 1855, her husband took out administration. After payment of the testator's debts and legacies, there still remained a surplus of the produce of the real estate in Court. The husband and administrator of Eliza Dealey then presented a petition, whereby he claimed one-fourth of the fund in Court as personal estate; but this claim was contested by her heir-at-law, who insisted that the surplus fund still retained the character of realty.

In delivering judgment, the Master of the Rolls, after referring to the general rule, that the conversion must take place only to the extent of the object required, and to certain cases in Lunacy which had been relied upon by the counsel for the husband, continued thus:—

“ I think, however, that the authorities cited, and

“ rules in lunacy, do not alter the principle in these
 “ cases. More of the real estate was sold than was
 “ necessary ; of course, the conversion is complete
 “ to the extent to which the purchase-money was
 “ required for the particular object for which the sale
 “ took place, namely, for the payment of the debts and
 “ costs, but the excess, though in the form of money,
 “ remained, as before, impressed with the character of
 “ land ” (a).

(II.) I pass to the subject of reconversion.

By reconversion I mean that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the constructively converted property restored in contemplation of a Court of Equity to its original actual quality. Thus real estate is devised upon trust to sell and to pay the proceeds to A. By virtue of this absolute trust the real estate is in Equity converted into personal estate. It belongs to A. as personalty. It may, however, be made A.'s property as real estate. In that event it is said to be reconverted ; and the process is called “ Reconversion.”

The origin and efficacy of reconversion consists in

(a) The soundness of the decision in this case, and of *Jermy v. Preston*, 13 Simons, 356, which was to the same effect, has been questioned by the present Master of the Rolls (Sir George Jessel), who states his view to be, that “ if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow, and that there “ is no equity in favour of the heir or any one else to take the property in “ any other form than that in which it is found ; and that the sole ques- “ tion to be considered in all these cases is whether the estate has been “ rightfully or wrongfully sold.” *Steed v. Preece*, L. R. 18 Eq. 192.

the right of every absolute donee or owner to dispense with, or forbid the execution of, any trust in the performance of which he alone is interested.

Thus, if a testator by his will directs his executor to lay out a sum of 1000*l.* in the purchase of an annuity, the annuitant has a right to say to the executor, "Give me the 1000*l.* I prefer that the annuity "should not be purchased" (*a*). The annuitant under these circumstances is said to exercise his right of "election" to take the fund directed to be laid out on the annuity, instead of the annuity itself.

This is a principle of very wide range. Its application to cases of conversion is at once apparent. In the case just supposed, of lands devised upon trust to sell and pay the proceeds to A., A. is entitled to the proceeds of sale; and being absolutely entitled, he has a right to dispense with the execution of the trust for sale, in which he alone is interested. He has a right to "*elect*" to take the land instead of the proceeds of sale. This right of election forms the groundwork of the doctrine of reconversion. In truth it may be said that reconversion depends upon "election."

I may as well point out the different sense in which I am now using the word "election," from that in which it was used when discussing in a former lecture the doctrine of election commonly so called. Then I treated of the obligation to elect between two species

(*a*) *Bayley v. Bishop*, 9 Vesey, 6. And even where no definite sum is named, but the direction is to purchase an annuity of a given amount, the annuitant is entitled to claim the sum which the annuity would have cost; *Ford v. Batley*, 17 Beavan, 303.

of property or benefit. Now I am speaking of the right to elect to take, in lieu of the proceeds or fruit of any given property, the property itself.

Reconversion then depends upon election, or rather upon the right of election; and the consideration of the question of reconversion may therefore be conveniently considered under the two following heads, namely:—

1. Who may elect so as to effect a reconversion.
2. How an election may be made, so as to produce that effect.

And first, who may elect?

It seems to flow from the mere statement of the general principle, that, where the person absolutely entitled to the property in question is under any personal incapacity, the right of election cannot be exercised. For how can a person who is under incapacity, as an infant or a lunatic, be permitted to alter the nature of the property to which he is entitled? Accordingly, it is well settled that where property which, in contemplation of Equity, is converted either from real into personal or from personal into real, belongs either to a lunatic or to an infant, there can be no reconversion. Thus, in *Seeley v. Jago (a)*, Lord Chancellor Cowper, speaking of the share of an infant of a sum of money directed to be laid out on land, said that it must be put out for the benefit of the infant, he, by reason of his infancy, being incapable of making

(a) 1 Peere Williams, 389.

(b) 1 Merivale, 296. And see *Re Wharton*, 5 De Gex, Macn. & Gor. 33.

an election. And in *Ashby v. Palmer* (b), where there was a trust for sale of real estate, and one of the daughters of the testatrix was a lunatic, Sir William Grant, after saying that a testator may dispose of his property as he pleases, continues thus:—

“ In the will now before me, it is clearly given by
“ the testatrix to her daughter *only as money*. When
“ she arrived at twenty-one, it might be that the whole
“ would remain unsold, and then she might have elected
“ to take it as land ; or, if she had kept it unsold,
“ being competent to make an election, she might have
“ been presumed to have so made her election. Here
“ she was manifestly incompetent to make any : and
“ it is as if she had died before the time arrived at
“ which she could have elected.”

So much for the case of lunatics and infants. The qualified personal incapacity of a married woman demands a more particular consideration.

And first, suppose the case of money directed to be laid out in the purchase of land, and the *feme covert* absolutely entitled to the land. In this case, before the late Fines and Recoveries Act, it was not uncommon, when the husband and wife wished to acquire an absolute interest in the money, to make a fictitious purchase. Thus, assume 5000*l.* liable to be laid out in land, to which the wife was entitled in fee. A friend was applied to, who, in consideration of the 5000*l.*, conveyed land to the wife. Then the husband and wife sold the land back for the same 5000*l.*, levying a fine of the land.

There was, however, a mode of avoiding this cir-

cuitous process, which is thus described by Lord Hardwicke in the case of *Oldham v. Hughes* (a):—

“ As to Mrs. Bourne’s capacity, if this money is to
 “ be considered as real estate, she is a *feme covert*, and
 “ cannot alter the nature of it barely by a contract or
 “ deed; for to alter the property of it, or course of
 “ descent, this money must be invested in land (and
 “ sometimes sham purchases have been made for that
 “ purpose), and she may then levy a fine of the land,
 “ and give it to her husband or anybody else. There
 “ is a way also of doing this, without laying the money
 “ out in land, and that is, by coming into this Court,
 “ whereby the wife may consent to take this money
 “ as personal estate; and upon her being present in
 “ Court, and being examined (as a *feme covert* upon
 “ a fine is), as to such consent, it binds this money
 “ articted to be laid out in land, as much as a fine at
 “ law would the land, and she may dispose of it to
 “ the husband, or anybody else (b); and the reason of
 “ it is this, that at law, money so articted to be laid out
 “ in land is considered barely as money till an actual
 “ investiture, and the equity of this Court alone views
 “ it in the light of a real estate, and therefore this
 “ Court can act upon its own creature, and do what
 “ a fine at Common Law can upon land; and if the
 “ wife had craved aid of this Court in the manner I

(a) 2 Atkyns, 453.

(b) See *Binford v. Bawden*, 1 Vesey, jun., 512; 2 Vesey, jun., 38. See also *Standerling v. Hall*, 11 Ch. D. 652, in which last case the present Master of the Rolls ordered the proceeds of sale of real estate to which a married woman was entitled in fee to be paid to her husband on her electing by examination in Court to take the money as personal estate.

“ have mentioned, she might have changed the nature
“ of this money which is realised, but she cannot do
“ it by deed.”

Next, as regards land directed to be sold, and the proceeds to be paid to a married woman.

Here the husband and wife might, under the old law, so long as the land remained unsold, by levying a fine, bar all the wife's interests in the proceeds to arise from the sale of the land. This was the point in *May v. Roper* (a).

There a married lady, being entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assigning, and levying a fine of, her share to a mortgagee; and it was decided that she was barred of her equity to a settlement, the late Vice-Chancellor of England saying that “it seemed to him he ought to hold that the
“ fine barred the wife of all interest that she could
“ derive either from the land or the proceeds of
“ sale of it.”

The result, therefore (leaving out of consideration the Fines and Recoveries Act, to which I shall presently allude), was, that in the case of a married woman entitled either to land to be purchased with money, or money to arise from the sale of the land, the husband might acquire the property in its unconverted state, although the wife had in strictness no capacity to elect; that is to say, in the case of money directed to be laid out on land, either by making a sham pur-

(a) 4 Simons, 360.

chase and levying a fine of the land fictitiously purchased, and reselling, or by consenting in Equity after the mode suggested by Lord Hardwicke; and in the case of money to arise from the sale of land, by levying a fine.

Such was the state of the old law; and under the Act for the Abolition of Fines and Recoveries, the result is precisely similar. That Act in substance says (*a*), that a married woman may, with the concurrence of her husband, and with the formalities there prescribed, dispose of any estate at Law or in Equity, or any *interest* (I condense the words purposely) in any lands, or money to be laid out in the purchase of lands.

In cases therefore where, at the present day, a married woman is entitled to money directed to be laid out on land, all that is requisite in order to acquire full dominion over the money is, that she and her husband should, by deed acknowledged by her, assign the money to a trustee of their own nomination. An absolute title is thus acquired in the money discharged from the trust for investment; and thus, at the option of the husband and wife, though not in strictness by mere *election*, a reconversion into money is effected.

Next, as to land directed to be sold, the proceeds of sale whereof are payable to a married woman.

The Fines and Recoveries Act, as I stated just now, enables a married woman to dispose of *any interest* in

(*a*) 3 & 4 Will. 4, cap. 74, s. 77.

land; and it is impossible to deny that the proceeds to arise from the sale of land are an interest in land. Indeed, so strong is the operation of the statute, that it is held that although a married woman cannot in general dispose of her interest in personal estate, so as to bind her right by survivorship (*a*), yet where that personal estate consists of monies to arise from the sale of real estate, she may do so by deed acknowledged (*b*), the subject-matter of disposition being then an interest in land, and falling therefore within the words of the statute. This was the point decided in *Briggs v. Chamberlain* (*c*).

There a married woman, being entitled to a share of the proceeds of real estate directed to be sold, by deed acknowledged, joined her husband in a mortgage thereof, the effect of which mortgage was the point for determination. The Vice-Chancellor, after stating the words of the Act, continued thus:—

“These words, therefore, enable a married woman, “by her deed acknowledged according to the provisions “of the Act, to dispose of any interest in land, either “at law or in equity, or any charge, lien, or incumbrance in or upon or affecting land, either at law or “in equity. Now, what is the property in question? “It is an interest in land which has been given by the “will of the testator to a lady who has executed a

(*a*) Pp. 61—65, ante.

(*b*) Of course any election by the husband and wife by deed not acknowledged would be unavailing: see *Sisson v. Giles*, 32 Law J. (N.S.) Chanc. 606; 3 De Gex, Jones, & Smith, 614; *Franks v. Bollans*, L. R. 3 Ch. App. 717.

(*c*) 11 Hare, 69; and see *Bowyer v. Woodman*, L. R. 3 Eq. 313.

“ disposition under this Act. The argument which has
“ been addressed to the Court against giving effect to
“ the disposition so made, has been—that, as the land
“ was directed by the will to be, and has been, con-
“ verted into money, the Court will regard it as money
“ only, and, therefore, as a species of property which
“ could not be disposed of by means of a fine, and
“ cannot now be disposed of by any conveyance sub-
“ stituted for a fine. I should have had no doubt or
“ hesitation in saying that the interest of this lady
“ under the will of the testator might be disposed of
“ by deed executed and acknowledged according to
“ the Act, if it had not been for the case of *Hobby v.*
“ *Allen*, in which the then Vice-Chancellor *Knight*
“ *Bruce* is reported to have come to a different con-
“ clusion. This decision directly conflicts with the
“ case of *May v. Roper*. I cannot distinguish the two
“ cases. A difference suggested is, that in one case
“ the interest was reversionary; but the question does
“ not turn on the difference between an interest in
“ possession and an interest in reversion. The ques-
“ tion is, whether it is an interest in land which can
“ pass by a fine, or by a deed having a like effect.”
And, after further discussing the authorities, the Vice-
Chancellor held that the wife’s interest was bound by
the deed (a).

It results then that a married woman, absolutely
entitled to the proceeds to arise from the sale of real

(a) In *Tuer v. Turner*, 20 Beavan, 560, the same point was decided in
the same way by the late Master of the Rolls; and see *Bowyer v. Weed-*
man, L. R. 3 Eq. 313.

estate, may, with the concurrence of her husband, make an absolute title to the proceeds, and when this is once effected, the person so absolutely entitled may claim the land discharged from the trust to sell, and thus effect a reconversion.

The question, therefore, in respect to personal capacity of individuals to effect a reconversion, may be thus summed up :—A lunatic cannot elect or effect a reconversion; neither can an infant; but a married woman, although in strictness she cannot elect, can nevertheless, though the special powers of disposition belonging to her and her husband, effect a reconversion.

Next, as regards the quantity of interest requisite to be owned in order to effect a reconversion.

Hitherto I have assumed that the person entitled, either to the money laid out in land or to the land to be sold for money, is entitled to the whole *absolute interest in possession*.

But how will the case stand where a person is entitled, not to the whole subject-matter, but only to an undivided share? Can he then elect?

The answer to this question may be different according as the subject-matter consists either of money to be laid out on land, or land to be turned into money.

Take the last case first. Suppose land devised upon trust to sell, and to pay one moiety of the proceeds to A., and the other moiety to B. Here, how can A. alone, or B. alone, elect to take the land? Each is entitled to have the *whole land* sold. A sale of an undivided moiety would obviously produce a far less

sum than would be receivable in respect of one-half of the proceeds of sale of the entirety. What right has either to compel the other to forego a sale of the whole property? Neither can, therefore, as against the other, elect to take any portion of the land *as land*; and there can, therefore, be no reconversion into land through the ordinary operation of the doctrine of election.

This was one of the points decided in *Holloway v. Radcliffe* (a). In that case a testator gave land to his widow for life, and, if his son survived her, to him absolutely; but if he died in the lifetime of the wife (which event happened), then upon trust to sell and hold the proceeds upon certain trusts, under which the son took two-thirds thereof. The son by his will affected to devise the land as real estate, and it was urged that his interest in the proceeds of sale was to be regarded as of that quality. But the Master of the Rolls, after pointing out that the will of the son was framed in the anticipation that he would survive the widow, continued thus:—

“The trust for conversion, on the death of the widow, was for the benefit of all the next of kin; and unless they all concurred in electing to take the property as land, the trust took effect. It would be repugnant to the principles on which the doctrines of conversion and reconversion rest, to hold that one of the legatees of an undivided share in the produce of real estate directed by the testator to be converted into personalty could, without the assent of the

(a) 23 Beavan, 163.

“ others, elect to take his share as unconverted, and
“ in the shape of real estate.”

Next suppose the case to be that of a sum of money directed to be laid out on the purchase of land to be settled upon trusts under which, in the events which have happened, the land would belong as to one undivided moiety for A., and as to the other undivided moiety for B.

Here, if the land were actually purchased, A. and B. would each be at once entitled to compel a partition. Neither can it be said that either one or the other would be in the slightest degree benefited by insisting on a joint purchase. On the contrary, it is strongly to be expected that separate purchases would prove more beneficial to each than a joint purchase subject to a right to partition. Under these circumstances, therefore, it is held that either A. or B. may elect to take his moiety of the money as money. For this I may refer you to the case of *Seeley v. Jago* (a).

There a testator devised that 1000*l.* should be laid out in purchase of lands in fee, to be settled upon A., B., and C., and their heirs *equally to be divided*. A. died, leaving an infant heir; and B. and C., together with the infant heir, filed a bill for 1000*l.* The judgment of Lord Chancellor Cowper is thus reported:—

“ The money being directed to be laid out in lands
“ for A., B., and C., *equally* (which makes them
“ tenants in common), and B. and C. electing to have

(a) 1 Peere Williams, 389.

“ their two-thirds in money, let it be paid to them ;
“ for it is in vain to lay out this money in land for B.
“ and C., when the next moment they may turn it into
“ money ; and equity, like nature, will do nothing in
“ vain. But as to the share of the infant, that must
“ be brought before the Master, and put out for the
“ benefit of the infant, who, by reason of his infancy, is
“ incapable of making an election. Besides, that such
“ election might, were he to die during his infancy, be
“ prejudicial to his heir.”

The next question which I shall consider is, whether a person who has an interest in the whole subject-matter, though of an expectant or deferred kind, can elect so as to effect a reconversion.

Thus, a sum of money is directed to be laid out upon land, to be settled to the use of A. for life, remainder to B. in fee. Can B., during A.'s lifetime, elect to take the money? Upon principle the answer ought, I conceive, to be in the negative. So long as A. lives, A. has a right to have the money laid out on land, and can at any time insist on that right. How can B., the remainderman, say, as against A., that the money to be laid out in land shall again become money,—shall be reconverted? The case differs from that before put to you of tenants in common of proceeds of sale only in this circumstance, that it is not necessarily, or even presumably, for the interest of the tenant for life to insist on a purchase being made. In strictness, however, the remainderman has as little right, as against the tenant for life, to say that he will take the money instead of the land, as one tenant in common of the

proceeds of sale of land has to say that he will take an undivided share of the land itself.

Upon the authorities, however, there is more difficulty. In the note of Messrs. White and Tudor to *Fletcher v. Ashburner* (a), to which I have already referred you, the general result of the cases upon this point is thus condensed :—

A remainderman may elect, but not so as to affect “the interests of the owners of prior estates.”

Of course if it be meant by this that a remainderman may, as between his real and personal representative, say that a particular reversionary interest to which he is entitled shall be treated as money or land, the proposition is indubitable. Even a tenant in common of proceeds of sale of land directed to be sold, may say *expressly* the proceeds shall be treated as land; but the question we are here discussing is, whether a remainderman can, by the mere exercise of his will, perform that act of election by which property is to be deemed as reconverted into its actual character?

In the case of *Triquet v. Thornton* (b), it certainly was taken for granted he might, though the point was not argued. If the decision in *Triquet v. Thornton* on this point is to form our guide, the result seems to be that a remainderman may, during the lifetime of the tenant for life, by election reconvert the fund as between his heir and personal representatives.

(a) Leading Cases in Equity, Vol. I. p. 685.

(b) 13 Vesey, 345.

But if this be so, this reconversion is, at all events, of a conditional or qualified kind only.

Thus, to revert to our former illustration (money articulated to be laid out upon land, to be settled upon A. for life, remainder to B. in fee). Now, according to *Triquet v. Thornton*, B. may, so long as the money has not actually been laid out, exercise an election to take it as money, subject to A.'s rights, and this exercise of election will be operative as between his real and personal representatives. But how if A., the tenant for life, should subsequently insist on the money being laid out on land? Then, I conceive, the effect of B.'s election must, at all events, be frustrated, and the land must go to his heir.

Such, I think, must be the view, even if the decision in *Triquet v. Thornton* is to prevail (a).

On the other hand, the observations of Lord Justice (then Vice-Chancellor) Knight Bruce, in the recent case of *Gillies v. Longlands* (b), seem to point to the stricter and sounder view, that so long as other rights intervene, the remainderman cannot elect—cannot reconvert—though, of course, no one could dispute his right expressly to regulate the devolution of any property as between his real and personal representative (c).

(a) The recent decision in *Meek v. Devenish*, 6 Ch. D. 566, is in exact accordance with this view. It was there held that a person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and that such election will become operative upon the contingency happening.

(b) 4 De Gex & Smale, 372.

(c) The judgment of Lord Westbury, in the case of *Sisson v. Giles*, 32 Law J. (N.S.) Chanc. 606; 3 De Gex, Jones, & Smith, 614, points to

There land was held, upon trust to pay the income to the separate use of a married woman for life, and after her decease upon trust for the children of herself and her husband, in terms giving them life interests only. The property was sold under a power of sale, and not reinvested in land. The wife had affected to treat the investment arising from the proceeds of sale as personal estate; and it was argued that her ulterior reversion, subject to the life interests, must be regarded as personal estate. But Lord Justice (then Vice-Chancellor) Knight Bruce, in delivering judgment, said:—

“The husband died in 1835, and three children of the marriage, and the wife, survived him; then the wife died in 1845, and was survived by two children of the marriage. There is no doubt but that at the death of the husband the fund was impressed with the character of real estate. After the husband’s death the wife had no power of herself to change the character of the property, because her children had a right to a voice in the matter in respect of their interests in remainder.”

The last point to which I shall call your attention is, as to the mode in which election may be made, or, in

the conclusion that, in order to effect a reconversion by the mere process of election, the party or parties electing must possess the entire absolute ownership in the subject-matter to be reconverted; but the decision itself may be supported on the simple grounds mentioned by V.-C. Malins in *Meek v. Devenish*. In *Walrond v. Rosslyn*, 11 Ch. D. 640, the right of a jointress to have a fund of personal estate laid out in the purchase of land was held sufficient to prevent the owner of the fund subject to the jointure from electing to take the fund as personal estate.

other words, what will amount to an election to take the property in its actual state so as to effect a reconversion.

The very statement of the point implies that a positive declaration of intention is not requisite, for of course an express declaration of intention on the part of the owner of property that it shall be deemed either real or personal estate is "*per se*" sufficient to bind those claiming under him, without any reference to the actual state or condition of the property at the time.

Thus, take the case of land directed to be sold and the proceeds of sale paid to A. As to any personal estate, from whatever source arising, A. may, by express declaration, say that as between his real and personal representative, that personal estate shall be real estate; and so, therefore, he may of course do this as respects the proceeds of sale of this real estate.

But reconversion by means of election, which we are here considering, is an offshoot of the general doctrine that property (in the case put, the real estate directed to be sold) though in Equity of one quality, is in fact of another quality (in our particular instance, though in Equity personalty, is in fact realty). In this state of things it is held that if the absolute owner unequivocally shows his desire and intention to possess the property according to its actual state and condition, that shall amount to an election so to take the property, and operate a reconversion.

It results, therefore, that this election, this expres-

sion of desire and intention, may be inferred from any acts or writings of the absolute owner. Moreover, it is not necessary that an intention to *reconvert* should appear; it is quite sufficient if an intention existed to take the property in its actual state.

Thus in *Harcourt v. Seymour* (a), where the question was, whether Lord *Harcourt* had by his acts reconverted into money a sum of 32,000*l.*, held upon trust to be laid out on land, Vice-Chancellor Kindersley thus expresses himself:—

“ It was argued, indeed, by Mr. Rolt, that there
“ must be an intention strictly to convert; that is to
“ say, that, knowing that the money was impressed
“ with the character of land, the party must say: ‘I
“ ‘ mean that it shall no longer be land, but it shall be
“ ‘ in its actual form of money.’ I do not, however,
“ think that that is the correct view of the law. It is
“ quite sufficient if the Court sees that the party
“ means it to be taken in the state in which it actually
“ is. Whether he did or did not know that, but for
“ some election by him, it would be turned into land,
“ is quite immaterial. If, being money, the party ab-
“ solutely entitled, indicated that he wished to deal
“ with it as money, and that it should be considered
“ as money, whether he knew or did not know that,
“ but for that wish, it would have gone as land, ap-
“ pears to me to be wholly immaterial.”

Upon the question what acts will be sufficient to indicate an election, it is difficult to lay down any

(a) 2 Simons (N.S.), 12, 46.

distinct rule. Perhaps the best general statement is that given by Lord Cottenham in the case of *Cookson v. Cookson* (a), in the following words :—

“ All the cases establish this, that where the conversion has not, in fact, taken place, and the interest vests absolutely, whether in land or money, in one person, any act of his indicating an option in which character he takes or disposes of it, will determine the succession as between his real and personal representatives.”

I will, however, mention some of the acts which have occasionally been more particularly relied upon as indicating an intention to elect.

Take, first, the case of real estate directed to be sold.

Entry upon the land and receiving the rents and profits (b) has generally been viewed, and justly so, as affording a strong indication of intention to elect; and though in one case (c) Sir William Grant seems to have considered that an entry for two years was too short a time to amount to an election, the authority of that decision is open to considerable doubt.

So the circumstance of granting leases reserving rent to the party entitled, his heirs or assigns, would afford a strong indication of election (d).

(a) 12 Clark & Finnelly, 146.

(b) See *Re Gordon*, 6 Ch. D. 531.

(c) *Kirkman v. Miles*, 13 Vesey, 338.

(d) *Crabtree v. Bramble*, 3 Atkyns, 680; and see *Mutlow v. Bigg*, 1 Ch. D. 385.

So any acts showing an intention to treat the trust as at an end (a).

In Davies v. Ashford (b), by a marriage settlement, real estates were conveyed to trustees in trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the marriage, and the husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement, and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement, and of the title deeds and remained in possession of them, and also of the estates, until his death. It was held that he had, by these acts, sufficiently declared his election to take the estates as land.

The late Vice-Chancellor of England in delivering judgment, said:—

“ I admit that the settlement contained a clear
“ trust for sale, which must have been exercised
“ unless Mr. Davies did some act which showed that
“ he meant the trust to be at an end, and to take
“ the estates as land.

“ It does not distinctly appear in whose custody the
“ title deeds originally were ; but it is clear that there
“ was a change in the possession of them, and that

(a) As for instance an agreement for the partition of the lands, Sharp v. St. Sauveur, L. R. 7 Ch. App. 343 ; or a petition to Parliament against a Railway Bill presented as on behalf of owners of the lands, and stating an intention to lay out the estate for building, Re Davidson, 11 Ch. D. 341.

(b) 15 Simons, 42.

“ Mr. Davies got them into his custody. Now was
“ not that of necessity a destruction of the trust? For
“ the trustees could not have compelled Mr. Davies
“ to deliver up the deeds; and, without doing so, they
“ could not have made any effectual sale of the estates.
“ Therefore, it seems to me that, by consulting on his
“ rights under the settlement, and then taking the
“ deeds into his possession (from whom or by what
“ means he obtained them is immaterial), he made a
“ clear election to take the estates as land.”

Next, as regards personal estate to be laid out on land. Of course, if the person entitled receives the money or securities, the trust is at an end—the reconversion is perfect. But acts short of reduction of the fund into possession will suffice.

Thus, in *Cookson v. Cookson* (a), already referred to, the question, whether a sum of 10,000*l.*, which for the purposes of the decision was treated as being impressed with the character of real estate, had, in fact, been reconverted, was decided in favour of the reconversion upon the strength of certain recitals contained in a deed executed by the tenant for life and remainderman of the money-land. And in *Harcourt v. Seymour* (b), also before referred to, a reconversion into money was, upon the result of various dealings, held to have been effected by Lord *Harcourt*, he being tenant for life of the money-land there in question, with remainder (subject to intermediate remainders which failed on his death without issue) to himself in fee.

(a) 12 Clark & Finnelly, 147.

(b) 2 Simons (N.S.), 12.

In concluding, as I am now compelled, my sketch of the doctrine of conversion, let me earnestly recommend to your attention the further pursuit of the subject, not only as being one of the most interesting that the range of our Equity reading presents, but on the further ground that the doctrine itself is firmly founded on sound reasoning, and approved by every consideration of good sense. I believe I may say, without fear of contradiction, that while the doctrines of "election" and "satisfaction" have (and as it seems to me not without just cause) been the subjects of repeated comment and doubt, that of "conversion" has deservedly escaped all hostile criticism.

ON THE
DEFENCE OF PURCHASE FOR VALUABLE
CONSIDERATION WITHOUT NOTICE.

CHAPTER I.

It is proposed to give in the following pages a sketch or outline of the Equity doctrine in respect to the defence of purchase for valuable consideration without notice, distinguishing what may be considered as settled from what must be regarded as still uncertain.

This investigation cannot be considered as of mere speculative interest, for the Judicature Act, 1873, provides that the High Court and every judge thereof, shall give to every equitable defence the same effect as the Court of Chancery ought to have given to it in any suit or proceeding instituted in that Court before the passing of the Act (*a*); and that generally where there is any variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail (*b*).

We will endeavour first to ascertain as nearly as we can what were the rules and doctrines of the Court of

(*a*) Section 24, subsection (2).

(*b*) Section 25, subsection (11).

Chancery with respect to the defence of purchase for value without notice, and then consider their application, or possible application, to litigation arising or to arise since the Court of Chancery became merged in the Supreme Court.

It may be premised that by "*Purchaser for valuable consideration without notice*," is meant a person who has paid or given money or money's worth for property, or some interest in property, without knowledge or the reasonable means of knowledge, of some claim against the property, or the interest therein purchased, already subsisting at the time when the consideration was paid: and the occasion for the defence arose upon the person entitled to the prior undisclosed claim taking some proceeding in the Court of Chancery impeaching or tending to impeach the title of the purchaser.

The question is, under what circumstances and to what extent was the defence a bar to such proceedings, and what is the rule or principle which governs or determines the validity, or otherwise, of the defence.

Now a reference to the judicial authorities discloses an amount of conflict in the decisions greater, perhaps, than has attended the development of any other Equity rule or doctrine; and such statements as we find of any general principle are almost equally at variance.

In many cases decided by judges of the highest authority, we find expressions which, taken literally, amount to this, that the defence is, under all circumstances, an absolute, unconditional bar.

Thus Lord Northington says (a): "A purchaser without notice for a valuable consideration is a bar to the jurisdiction of the court." Lord Loughborough, though he certainly did not always adhere to the principle (b), is found saying on one occasion (c): "I think it has been decided that against a purchaser for valuable consideration without notice, the court will not take the least step imaginable." Lord Eldon, in a celebrated judgment, expresses himself thus: "I am not aware *that follows as a principle of sound equity if the principle of the court is that against a purchaser for valuable consideration without notice the court gives no assistance*" (d). Lord St. Leonards says: "In my opinion, whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title" (e). And Lord Romilly says: "My opinion is that, when once you establish that a person is a purchaser for value without notice, this court will give no assistance against him, but the right must be enforced at law" (f).

Now the first observation to be made upon this

(a) Stanhope v. Earl Verney, 2 Eden, 81 ; see p. 85.

(b) See Strode v. Blackburne, 3 Vesey, 222.

(c) Jerrard v. Saunders, 2 Vesey jun., 454 ; see p. 458.

(d) Wallwyn v. Lee, 9 Vesey, 24 ; see p. 34.

(e) Bowen v. Evans, 1 Jones & Latouche, 178 ; see p. 264.

(f) Attorney-General v. Wilkins, 17 Beavan, 285 ; see p. 293.

apparently overwhelming concurrence of high legal authority is that the acceptance of the principle, as laid down in its simple unqualified form, would be repugnant to the every day practice of the Court of Chancery and of its virtual successor the Chancery Division of the High Court of Justice.

For instance it is clear that the defence has no application where a person claiming as *cestui que trust* invokes the jurisdiction of the court to obtain distribution or administration of a trust fund which is either in the custody of the court itself or in that of a third person who is before the court in the character of trustee. If, in such a case, the fact that a claimant later in point of time of purchase was a purchaser for value without notice could be regarded as a reason for the court not exercising its ordinary jurisdiction, the result would be to paralyse the action of the court altogether; since clearly the claimant earlier in time of purchase must have taken without notice of rights which were not even existent when his own were acquired.

Some limitation or qualification of the principle as so stated is absolutely necessary. What is it?

The reported decisions afford, so far as the writer is aware, no direct answer to this question. In a case which came before Lord Westbury, and in which the universal, unqualified nature of the defence was strongly insisted on at the bar, his lordship, while denying the universal application of the defence, made no attempt to define completely the limits to its application, but contented himself with classifying the cases in which

the defence had been held to be properly applicable, and with distinguishing the case before him from those so classified (a). The judgment of Lord Westbury has been the subject of much comment, and cannot, it is considered, be regarded as unimpeachable in all respects; but the classification of cases adopted by him is sufficiently accurate for general purposes, and, as it is the only one possessing any sanction of judicial authority, it is proposed to adopt it here for the purpose of discussing and considering the cases themselves. After this discussion, but not until then, some attempt may perhaps be usefully made to discover the principle or circumstances limiting the application of the defence.

Lord Westbury says in effect, in the case referred to, There appear to be three cases in which the use of this defence is most familiar.

(I).—Where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, in which case the defence (Lord Westbury says) is good; and the reason given is that, as against a purchaser for value without notice, the court gives no assistance—*that is no assistance to the legal title*.

But (Lord Westbury continues) this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law; and he cites, in support of this exception, *Williams v. Lambe* (b), and *Collins v. Archer* (c).

(a) Phillips v. Phillips, 4 De Gex, Fisher & Jones, 208.

(b) 3 Brown's Chancery Cases, 263.

(c) 1 Russell & Mylne, 284.

(II.)—Where there are several purchasers or incumbrancers, each claiming in equity, and one who is later in time succeeds in obtaining an outstanding legal estate, or some other legal advantage; and the principle is that a Court of Equity will not disarm a purchaser, which is the common doctrine of the “*tabula in naufragio*.”

(III.)—Where there are circumstances that give rise to an equity as distinguished from an equitable estate, as for example an equity to set aside a deed for fraud or to correct it for mistake.

Following then Lord Westbury's classification, let us first consider the cases of application by the possessor of a legal title to the auxiliary jurisdiction of the Court of Chancery.

These cases may be conveniently ranged under the heads of bills for discovery in aid of proceedings at law, bills for discovery and for the delivery up of title-deeds (a) or for the removal of terms, and bills to perpetuate testimony.

(a) Lord Westbury in his classification, expressly mentions a bill for the delivery of title deeds (referring to *Wallwyn v. Lee*) as an instance of application to the auxiliary jurisdiction of the Court, and we are here merely following his classification; but the question whether a particular head of Equity jurisdiction should more properly be regarded as “exclusive,” “concurrent,” or “auxiliary,” is often attended with difficulty. Thus “specific performance” might be considered “exclusive” in so far as a Court of Equity alone afforded the particular remedy, “concurrent” in so far as it exercised concurrently with Courts of Law jurisdiction in respect to the particular contract of sale, and “auxiliary” in so far as the particular remedy afforded by the Court of Equity aided the defectiveness of the remedy given by the Common Law Court. According to the last of these aspects, a bill for the delivery of title deeds would correctly be regarded as an application to the “auxiliary jurisdiction.”

As respects bills for discovery, the leading case of *Bassett v. Nosworthy* (a) is one of the earliest and most authoritative decisions. There an heir-at-law filed his bill against a person claiming as purchaser from the devisee under the will of his ancestor in order to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration *bonâ fide* and without notice of any revocation, and the plea was allowed; and upon the truth of it being established by evidence, the bill was dismissed.

The bill sought also to set aside incumbrances which the defendant had bought in to protect his purchase.

In delivering judgment, Lord Nottingham (then Lord Keeper Finch) thus expresses himself:—"A purchaser *bonâ fide* without notice of any defect in his title at the time of the purchase made may lawfully buy in a statute or mortgage or any other incumbrance, and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a Court of Equity by setting aside such incumbrances, for Equity will not disarm a purchaser."

A more distinctly typical instance of the simple bill for discovery occurs in the case of *Jerrard v. Saunders* (b), which came twice before Lord Loughborough. On the first occasion, although the defence of purchase for value without notice had been pleaded, Lord

(a) Reports *temp.* Finch, 102.

(b) 2 Vesey jun., 187, 454.

Loughborough held that the purchaser must answer on oath as to all facts relevant for the purpose of determining whether he actually had notice. Upon an answer being put in, in submission to the decision, an attempt was made to extract further discovery going beyond the question of notice. And thereupon Lord Loughborough held the answer sufficient, saying: "I am perfectly satisfied upon the general reasoning that this Court will never extend its jurisdiction to compel a purchaser, who has fully and in the most precise terms denied all the circumstances mentioned as circumstances from which notice may be inferred, to go on to make a further answer as to all the circumstances of the case that are to blot and rip up his title. To do so would be against the known established principles of the Court."

Then follow the words already quoted: "I think it has been decided that, against a purchaser for valuable consideration without notice, this Court will not take the least step imaginable."

We will now consider bills for the delivery up of title deeds.

At law, antecedently to the Common Law Procedure Act, 1854, which conferred powers to compel specific delivery of chattels (though by distress only—a somewhat ineffectual process), the legal owner of title deeds could recover from the wrongful possessor of them in an action of *trover* damages only, and in an action of *detinue* the deeds themselves or, at the option of the person wrongfully detaining them, their assessed value.

In a fitting case the Court of Chancery supplied this defect in the Common Law jurisdiction by ordering the wrongful holder of the deeds to deliver them up to the rightful owner.

In *Wallwyn v. Lee (a)*, a tenant for life under a settlement suppressing the settlement affected to mortgage the property in which he had a life estate only, and handed over the earlier deeds to the mortgagee.

On his death the remainderman under the settlement filed a bill for discovery and to have the deeds delivered up. The mortgagee pleaded that he was a purchaser for value without notice. And Lord Eldon upheld the defence.

At first blush the decision seems of doubtful policy. Tenants for life of settled estates are habitually, as of right, the holders of the title deeds of the property in settlement, and the result might seem to be to favour the wrongful deposit of such deeds. The question, however, was not one of policy, but of the principle by which a Court of Equity was to be governed in such cases. And pursuing its own principles, the Court gave to the remainderman who was legally entitled to the deeds no assistance against the purchaser for value without notice, but at the same time left him free to assert his rights at law as best he might.

Lord Eldon, after adverting to the imperfection of the jurisdiction at law in reference to the recovery of the deeds, and pointing out that the plaintiff was

(a) 9 Vesey, 24.

seeking the special assistance of a Court of Equity to recover possession of them, said: "Is it not worth
" consideration whether the very principle of this plea
" is not this. I have honestly and *bonâ fide* paid for
" this, in order to make myself the owner of it, and
" you shall have no information from me as to the
" perfection or imperfection of my title, until you
" deliver me from the peril in which you state I have
" placed myself in the article of purchasing *bonâ fide*.
" Is it not worth consideration whether every plea of
" purchase for valuable consideration without notice
" does not admit that the defendant has no title? If
" he has a good title, why not discover? I apprehend
" there is sufficient ground for saying a man who has
" honestly dealt for valuable consideration without
" notice shall not be called upon by confessions wrung
" from his conscience to say he has missed his object
" in the extent in which he meant to acquire it.

* * * * *

" Next, the possession of the deeds at least is a
" thing purchased with the estate, and if it happens
" that the purchase misses its object to this extent
" that the purchaser has had the possession taken
" from him without the assistance of the Court, is
" there a clear principle that therefore the possession
" of the deeds shall, with the assistance of the Court,
" be recovered by that person who so obtained possession of the estate? I am not sure that follows as a
" sound principle of Equity; if the principle of the
" Court is that against a purchaser for valuable consideration, this Court gives no assistance."

Lord Eldon, after thus characteristically disclosing his own views on the subject behind a thin though continuous veil of interrogation and hypothesis, in the first instance reserved final judgment, mainly in consequence of the recent previous decision of Lord Loughborough in *Strode v. Blackburne* (a), which Lord Eldon felt to be wrong, but was unwilling to overrule without due consideration, and ultimately allowed the plea.

In *Wallwyn v. Lee*, the handing over of the deeds was an adjunct, so to speak, to a fraudulent mortgage by a tenant for life.

The more recent authorities seem to suggest a doubt whether the principle of that decision applies to a case in which the whole transaction consists in a mere wrongful deposit of deeds.

In the case of *Joyce v. De Moleyns* (b), decided by Lord St. Leonards, when Lord Chancellor of Ireland, the heir at law of a former owner of impropriate tithes, the true title to which was in a devisee thereof under the owner's will, deposited the title deeds relating thereto with his bankers. The bill sought delivery up of the deeds, but Lord St. Leonards considered that no relief could be given in equity against the bankers, they being purchasers for value without notice, and dismissed the bill as against them with costs.

In the subsequent case of *Newton v. Newton* (c),

(a) 3 Vesey, 222.

(b) 2 Jones & Latouche, 374.

(c) L. R. 6 Eq. 135.

Lord Romilly considered that a distinction existed between the case of a deposit by a person who has some possibility of interest (as the owner of the equity of redemption who has already created charges but retained the deeds), and that of a deposit by a person who has no *scintilla* of interest, such as a mortgagee who is a mere trustee for others, and held that in the latter case a decree could properly be made directing the deeds to be delivered up by the person with whom they had been improperly deposited, though without notice on his part of the trust.

It is not easy to reconcile this view with *Wallwyn v. Lee*.

In that case the tenant for life who handed over the deeds had certainly, at the time when he so handed them over, an interest in the land and in the deeds, but by his death every *scintilla* of interest had vanished.

However, Lord Romilly having, as he considered, by means of this distinction freed himself from the authority of *Wallwyn v. Lee*, came to a decision in direct opposition to that of Lord St. Leonards in *Joyce v. De Moleyns*.

There was an appeal in *Newton v. Newton* (a) which succeeded on the ground that upon a due consideration of the material facts, the money advanced by the mortgagee was not trust money, but that of the mortgagee himself; but Lord Hatherley, in delivering the judgment of the Court of Appeal, stated that although

(a) L. R. 4 Ch. 143.

the Judges of Appeal had arrived at a different conclusion from Lord Romilly on the evidence, they wished to be understood as not entertaining any opinion adverse to that expressed by him upon the question of law. And his decision that the title deeds might properly be ordered to be delivered up was treated as possibly justifiable.

Lord Hatherley said:—"There appears to us to be
 " a material distinction between *Wallwyn v. Lee* and
 " cases in which either in consequence of the fund
 " being in Court as in *Stackhouse v. Countess of*
 " *Jersey (a)*, or in consequence of the legal estate
 " being outstanding in a trustee, and the beneficial
 " interest being claimed by several adverse but equally
 " innocent purchasers for value without notice, the
 " Court is called upon to declare and does declare
 " the right to the fund or estate in question. In
 " such cases the Court is necessarily called upon
 " to make, and does make, a decree against some
 " one or more of such purchasers for value, but

* * * * *

" such a decree would obviously be incomplete
 " in a material particular, if while declaring the
 " plaintiff to be absolutely entitled to the whole
 " beneficial interest in the estate it left the title
 " deeds in the possession of one of the defendants
 " claiming to hold them under an adverse title which
 " the same decree declared to have no valid founda-
 " tion."

(a) See this case reported, 1 Johnson & Hemming, 721.

Upon the distinction thus suggested by Lord Hatherley, two observations occur:—The first, that in such cases as *Wallwyn v. Lee* and *Joyce v. De Moleyns*, the value to the purchaser of the defence set up by him was materially lessened by the circumstance that after all he remained liable at law in an action of trover or detinue, and yet the Court of Equity declined to deprive him of such small advantage as the possession of the deeds might confer. In such a case as *Newton v. Newton*, no action, as it would seem, would have lain at law, and by the decree to deliver up the deeds the far more substantial advantage possessed by the purchaser would be taken away.

The second is that Lord Hatherley would seem to regard such a case as *Newton v. Newton* as not falling properly within Lord Westbury's first class and the doctrine established by *Wallwyn v. Lee* as being therefore not applicable.

However, in the more recent case of *Heath v. Crealock* (a), which was that of a purchase from a mortgagor, the mortgage being fraudulently suppressed, the Court of Appeal, while giving relief by way of foreclosure against the purchaser, who had not the legal estate, held that it could not properly direct him to deliver up the deeds in his possession.

This case must be regarded as completely rehabilitating (if this were needed) the decision in *Wallwyn v. Lee*. It establishes, moreover, incidentally, that the

(a) L. R. 10 Ch. 28 ; followed in *Waldy v. Gray*, L. R. 20 Eq. 238.

principle of that decision is not to be infringed even indirectly.

On the hearing in the Court below a decree had been made, under the statutory power, for sale instead of foreclosure, and, as incidental to the sale, for delivery of the deeds by the purchaser for value. On appeal the Lord Chancellor pointed out that the Court was not in the habit of ordering a sale unless it could go on and give possession, and insure the handing over of the title deeds, and that this was precisely what the Court could not properly do against a purchaser for value without notice, and that for that very reason the decree ought to be varied by decreeing foreclosure and not a sale. And Lord Justice James, after laying down that the Court had no right to interfere with the purchaser for value, went on to say that it would be interfering with him "if, through the form of a decree directing a sale instead of a foreclosure, or anything of that kind, it merely did indirectly that which it could not do directly—deprive him of possession of the land (*a*) or deeds."

(*a*) Lord Westbury in *Phillips v. Phillips*, 4 De Gex, Fisher & Jones, 208, see page 218, denied that possession of the land ought to be regarded as a legal advantage of which a purchaser for value is not to be deprived, saying:—"It was indeed said at the Bar that the defendants being in possession had a legal advantage in respect of the possession of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the Court to one or to the other. But the subject of controversy, and the means of determining the right to that subject, are perfectly different. The argument, in fact, amounts to this: I ought not to be deprived of possession, because I have possession. The purchaser will not be

The principle of decision applicable to cases of bills for discovery, or for discovery and delivery up of title deeds, applied equally to bills by a legal owner to prevent the defendant sued by him in ejectment from setting up old terms or other legal interests.

This is established by the passage from *Bassett v. Nosworthy* already cited (a), to which may be added, as a fair typical instance, the modern case of *Goleborn v. Alcock* (b).

In that case a lease for 61 years had been granted by a person who represented himself to be owner in fee, whereas he was, in fact, only tenant for life, with power of leasing, and the lease was bad as not being in conformity with the power.

On the death of the tenant for life the remainderman brought ejectment against the assignee of the lessee, who thereupon got in some old terms. The bill sought to restrain the assignee of the lease from setting up the terms, but it was held that he was entitled to do so, and the bill was dismissed with costs.

The same principle applied also, it is conceived, to bills for the perpetuation of testimony.

In *Jerrard v. Saunders* (c), we find Lord Loughborough saying:—"In reference to a purchaser for
"valuable consideration without notice, I believe it is
"decided that you cannot even have a bill to per-
"petuate testimony against him."

"deprived of anything that gives him a legal right to the possession,
"but the possession itself must not be confounded with the right
"to it."

(a) Ante, p. 393.

(b) 2 Simons, 552.

(c) 2 Vesey jun., 454 ; see p. 458.

The case which Lord Loughborough had in his mind was probably *Bechinall v. Arnold* (a), which was a bill by a devisee to prove a will and perpetuate the testimony of the witnesses to it. The defendant pleaded purchase without notice, and the plea was allowed.

* The case is not a thoroughly satisfactory authority, because it does not appear that there was anything to prevent the plaintiff from bringing ejectment against the purchaser; and the arguments presented to the Court on behalf of the purchaser for value were rather arguments in support of a demurrer to the bill for want of equity than in support of the plea. Still the fact remains that the plea was allowed.

We pass now from Lord Westbury's first class of cases, viz., those in which the application is to the auxiliary jurisdiction of the Court; to the exception laid down by him, and in support of which he cites *Williams v. Lambe* (b), and *Collins v. Archer* (c), to the effect that the defence does not apply when the Court exercises a legal jurisdiction concurrently with Courts of law.

These two decisions will require a detailed examination.

Their history is as singular as that of any that have contributed to the creation of case-made law; and their ultimate fate, as decisions, must be regarded as still doubtful.

(a) 1 Vernon, 354.

(b) 3 Brown's Chancery Cases, 263.

(c) 1 Russell & Mylne, 284.

They were originally in terms rested, or considered to have been rested, by the Judges who decided them on a supposed doctrine, that a plea of purchase for valuable consideration is of no avail against a plaintiff who comes into equity asserting a legal title; and the special notice which they have attracted has been due mainly to that circumstance.

They must now be upheld, if at all, by means of the distinction suggested by Lord Westbury.

The doctrine on which they were founded has been authoritatively denied to exist, and yet the decisions themselves have been treated as binding as well by one of the Judges who repudiated the existence of the doctrine (*a*), as by Lord Westbury in making the exception which is now under consideration.

It will be more convenient to consider the alleged doctrine first.

We find it alluded to in an early case (*b*), in which Lord Nottingham is represented as saying, “Where the plaintiff hath a title in law, there, though the defendant doth purchase without notice, yet he shall discover writings, but otherwise it is if the plaintiff hath only a title in equity; for there, if the defendant purchased without notice he shall never discover nor make good the plaintiff’s title.”

However, in a case occurring less than four years earlier, and contained in the very same volume (*c*),

(*a*) Lord Romilly, see *Attorney-General v. Wilkins*, 17 Beavan, 285; *Finch v. Shaw*, 19 Beavan, 500, at p. 509.

(*b*) *Rogers v. Seale*, 2 Freeman, 84; H. T. 1681.

(*c*) *Eurlace v. Cook*, 2 Freeman, 24; T. T. 1677.

Lord Nottingham is reported as not only deciding that an heir relying on a legal title has no right to discovery, but as saying that "the Court will not compel the showing of writings to any person unless he hath an equitable title, as a mortgagee."

It is to be noted, moreover, that any such decision as that in *Rogers v. Scale* would have been distinctly opposed to Lord Nottingham's considered and fully reported judgment in *Bassett v. Nosworthy* (a), already discussed.

In truth, these old cases in Freeman's Reports are too shortly and too imperfectly reported to carry any weight.

Neither does *Rogers v. Scale*, nor indeed either *Williams v. Lambe*, or *Collins v. Archer*, contain any judicial statement of the ground upon which the supposed doctrine was founded.

It may possibly have arisen from some ill-considered application of the reason sometimes alleged, in cases falling within Lord Westbury's second class, for the non-interference of the Court against a purchaser for value without notice, viz., that he has an equal equity and also law in his favour (b), (say by getting in an outstanding legal estate), and thence it may have been inferred, however unsoundly, that when a man comes to a Court of Equity, having both law and an equal equity, the Court ought to give him relief against the purchaser for value having only an equal equity.

(a) Reports *temp.* Finch, 102.

(b) See *Belchier v. Butler*, 1 Eden, 523, p. 529; *Lowther v. Carleton*, Cases *temp.* Talbot, 187.

In *Collins v. Archer* (a), presently to be considered, an attempt was made at the Bar to support the supposed doctrine by the argument that “a defendant in order to avail himself of the plea of being a purchaser without notice, must have either the legal estate, or a better right than the plaintiff to call for the outstanding estate; and consequently that that plea can never be made use of against a plaintiff who relies on a legal title.”

The answer to this argument is, that except in the cases falling under or resembling those in Lord Westbury's second class and presently to be considered; it is certainly not necessary that a defendant should have the legal estate, or a right to call for it, in order to entitle him to set up the defence; and even if the argument could be regarded as sound, we find no trace of its having been judicially adopted.

The question seems generally to have been viewed almost as one of a technical rule, supported by some decisions and opposed by others, but for which no principle or reason is assigned, except perhaps by those setting up the defence, on whose part the contention has been that according to the general principles of equity, the defence ought to be considered as an absolute unqualified bar under all circumstances.

A short summary of the decisions bearing on the point down to and including *Bowen v. Evans* (b), will be found in the 11th edition of Lord St. Leonards' *Vendors and Purchasers*, upon the result of which

(a) 1 Russell & Mylne, 284, see page 288.

(b) 1 Jones & Latouche, 263.

Lord St. Leonards expresses his opinion to be that the defence holds good against a legal title ; but there is no discussion or elucidation of the principle upon which the question in doubt is to be determined.

In *Joyce v. De Moleyns* (a), already discussed, Lord St. Leonards held that the defence of purchase for value without notice, was a shield as well against a legal as an equitable title ; and in a case decided in 1853, (b), Lord Romilly, after pointing out the weakness already adverted to (c), of the argument in *Collins v. Archer*, continued thus : “ The cases of “ *Wallwyn v. Lee* and *Joyce v. De Moleyns*, expressly “ determine that the defence of purchase for value “ without notice is a good defence where the right “ sought to be enforced is a legal right ; and I have in “ vain endeavoured to discover upon what ground it “ can be held that it is not a defence against a legal “ claim in this Court. This Court certainly does not “ favour legal any more than equitable rights, but “ rather the contrary.”

Further on in the same case we find Lord Romilly marshalling, so to speak, in opposite ranks, without any detailed discussion of them, the decisions supporting and those negating the soundness of the supposed doctrine, the former of which consist solely of *Rogers v. Seale*, *Williams v. Lambe*, and *Collins v. Archer*, to which, it is believed, no addition could have been made.

(a) 2 Jones v. Latouche, 374.

(b) Attorney-General v. Wilkins, 17 Beavan, 285 ; see page 292.

(c) Ante, page 406.

In a case decided by him only a year later (*a*), and which we shall have to consider further on, we find Lord Romilly referring to *Williams v. Lambe* and *Collins v. Archer*, in terms which appear to recognize them as valid decisions upon special grounds, but only after reiterating his view that the defence of purchase for value without notice applied as well against a legal right as an equitable right.

Finally, in the case of *Phillips v. Phillips* (*b*), from which we have taken our classification, decided by Lord Westbury in 1862, we again find *Williams v. Lambe* and *Collins v. Archer*, treated as valid decisions, but only on the special ground that in them the Court was asked to exercise a branch of concurrent jurisdiction; so that in the result *Rogers v. Seale*, the untrustworthiness of which has already been exposed (*c*), is alone left to support the supposed doctrine, a doctrine opposed to the whole of the cases contained in our first class, and which may justly be regarded as exploded.

Let us now consider the two cases themselves.

Williams v. Lambe (*d*), was that of a bill by a widow praying discovery of the lands out of which she was dowerable, and an assignment of dower.

At that time a widow might either sue for her dower at law, or file a bill in equity for the same purpose. The jurisdiction of the Court of Chancery as to dower, was technically concurrent only with that of

(*a*) *Finch v. Shaw*, 19 Beavan, 500.

(*b*) 4 De Gex, Fisher & Jones, 208.

(*c*) Ante, page 405.

(*d*) 3 Brown's Chancery Cases, 263.

the Common Law Courts; but in practice its superior efficacy led to its being almost exclusively resorted to.

This superior efficacy lay in the power of the Equity Court, to compel purchasers from the widow's husband to disclose the facts requisite to determine whether the widow was or not dowable out of the lands purchased by them.

To the bill of the widow, in *Williams v. Lambe*, a plea of purchase for valuable consideration without notice, going to the relief as well as the discovery, was put in.

Lord Thurlow is reported as saying: "The only question was, whether a plea of purchase without notice would lie against a bill to set out dower: that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable not to a legal title: he therefore overruled the plea."

The first observation that occurs upon this case is, that it is somewhat difficult to see how the plea of purchase for value without notice could ever properly apply to a bill for dower. Dower is not a claim of the existence of which a purchaser can, in the absence of distinct notice, have no notion or suspicion. The purchaser buys from a vendor of full age. It might well be said that he is bound to take notice that the vendor is or may be married, and that if he choose to make no inquiry on so important a point he must abide the consequences of his omission.

We pass by, however, the difficulty referred to, and proceed to the question whether, notwithstanding the broad ground on which Lord Thurlow based his judg-

ment, the case may not be regarded as having really decided nothing more than that the Court would, notwithstanding the plea of purchase for value without notice, exercise its ordinary concurrent jurisdiction of assigning dower to a widow.

A learned author (*a*), in referring to the decision, upholds it as sound, saying: "When it is admitted that dower is a mere legal right, and that a court of equity, in assuming a concurrent jurisdiction with courts of law, professedly acts upon the legal right, that court, in analogy to law, where such a plea would not be looked at, decides that in this instance the same equitable plea is also inadmissible. This analogy, it is obvious, does not hold when the widow applies for equitable relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice cannot, as it would seem, be resisted. In the first case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right which the defendant cannot at law resist by such a mode of defence; in the second case she applies to the equity of the court to take away from him a defence which at law would protect him against her demand."

It is not clear whether Mr. Roper, in this passage, intended to put "*discovery*" on the same footing as "*removal of terms*." It certainly should be, and the argument for the plaintiff, in *Williams v. Lambe*, as shortly reported, would seem to have been: "It may

(*a*) Roper on Husband and Wife, vol. i. 446, 1st ed.

“ be admitted that the plaintiff is not entitled to discovery, but at all events the plea is bad as going to relief as well as discovery.”

That the plea was in fact a good plea to the discovery prayed must be considered as established by the decision of the Court of Common Pleas in the case of *Gomm v. Parrott (a)*, in the year 1857.

There a widow, instead of adopting the ordinary course of filing a bill in equity, brought a writ of dower at law. She then applied for inspection of the purchaser's purchase deed under the 50th section of the Common Law Procedure Act, 1854, which authorised the Court to make an order for inspection of any document, to the production of which either party is entitled *for the purpose of discovery or otherwise*. The purchaser met the application by swearing that he was a purchaser for value without notice, and contending that as a Court of Equity would not under such circumstances have compelled a discovery, neither could the Court of Law do so under its new jurisdiction.

Thus incidentally a review of Lord Thurlow's decision in *Williams v. Lambe*, and of the later authorities, became requisite; and the Court of Common Pleas, after such review, held that the weight of authority was greatly in favour of the proposition that no bill for a discovery could have been maintained, that the defence therefore applied to the case under consideration, and that the demandant (*i.e.*, the plaintiff) in the writ was not entitled to inspection.

(a) 3 Jurist, N. S. 1150; 3 Com. B., N. S. 47.

The outcome of our consideration of *Williams v. Lambe* appears to be that, if Mr. Roper's argument be adopted as sound, the decision may be supported on the special ground suggested by Mr. Roper, but that the report of the case affords no sufficient warrant that the decision was in fact based on that ground.

Let us now consider *Collins v. Archer* (a).

Courts of Equity were in the habit of decreeing in favour of tithe owners an account of tithes, and the bill in that case was an ordinary bill for an account by a lessee of tithes against an occupier of titheable lands. To the bill the occupier set up a subsequent lease of the tithes to himself for value without notice of the lease under which the plaintiff claimed. The case appears to have been thoroughly argued, and the arguments are fully reported.

The counsel for the plaintiff relied on *Williams v. Lambe* as establishing the proposition that the defence of purchase for valuable consideration without notice did not apply against a person whose claim in equity was founded on a legal title (b), and adopting apparently the observations of Mr. Roper, supported the decision of *Williams v. Lambe* by the following argument:—

“If a party sought to enforce his legal title in a
“Court of Law, the defence of purchase for valuable
“consideration could not be set up. Why, then,
“should it be available in a Court of Equity when that
“Court is not acting on an equitable title, or giving

(a) 1 Russell & Mylne, 284.

(b) See this portion of the argument stated at pages 288–290 of the Report.

“ equitable relief, but is proceeding on a title purely
“ legal, and exercising a *concurrent* jurisdiction with
“ courts of law for the purpose of giving the same
“ relief as would be afforded by them, but of giving
“ it by more effectual or convenient means. Here the
“ plaintiffs stand upon their legal title to the tithes ;
“ they might recover them by an action against which
“ the title of purchaser for valuable consideration
“ without notice would be no defence ; and they apply
“ to a Court of Equity (the subject being one in which
“ a Court of Equity has *concurrent* jurisdiction) because
“ the account which is necessary to complete relief can
“ be obtained more conveniently here than by pro-
“ ceeding at law.”

The judgment of Sir John Leach, as reported, and most probably correctly, was very short ; and so far as it directly relates to the validity of the defence set up, in the following words :—

“ The defendant states by his answer that he is a
“ purchaser for valuable consideration without notice
“ of the plaintiff’s prior charge. Following the case
“ of *Williams v. Lambe*, and the general principles of
“ a Court of Equity, I am of opinion that the defence
“ is of no avail against the legal title.”

It would seem difficult to extract from this judgment any assent on the part of Sir John Leach to the argument that *Williams v. Lambe* was well decided, because in that case, as in the principal one before him, the court was merely called upon to exercise a branch of concurrent jurisdiction. According to the natural import of the words used by Sir John Leach, *Williams*

v. *Lambe*, as decided by Lord Thurlow, in which nothing was said at the bar or otherwise about concurrent jurisdiction, and in which the law is laid down broadly that the defence is “*only a bar to an equitable not to a legal title*,” is the case which is followed.

It appears, however, from another part of Sir John Leach’s judgment, that the circumstance that he was exercising a head of concurrent jurisdiction was present to his mind, for in reference to a subordinate question, viz., as to the time from which the account should be taken, he expressed himself as follows :—

“In these cases a Court of Law and a Court of
“Equity have concurrent jurisdiction ; and inas-
“much as in a Court of Law the plaintiff could
“recover the arrears for six years before the com-
“mencement of the action, the defendant here must
“account for the tithes for the six years previous to
“the filing of the bill.”

It is from this portion of the judgment, no doubt, that Lord Westbury derived the conclusion that the true “*ratio decidendi*” of *Collins v. Archer* was that the application was to the concurrent jurisdiction of the Court, and having reached that conclusion, he applied, by an “*ex post facto*” process, the same explanation to the decision of *Williams v. Lambe*, which neither in argument nor in judgment contains any allusion to the circumstance of the concurrent jurisdiction being invoked.

In an elaborate review by Lord St. Leonards in the fourteenth edition of the *Treatise on Vendors and Pur-*

chasers, of the whole question of the validity of the defence as against a legal title, his Lordship, in discussing *Phillips v. Phillips*, and more particularly the observation of Lord Westbury, that the defence does not apply "where the Court exercises a legal jurisdiction concurrently with Courts of Law," makes the following remark:—"It will be observed that the decisions in *Williams v. Lambe* and *Collins v. Archer* were not made on the ground now suggested."

We have endeavoured to show to what extent there may be reason for inferring that the decision in *Collins v. Archer*, at least, was made on the ground suggested.

The ultimate result of the consideration of the two decisions of *Williams v. Lambe* and *Collins v. Archer*, seems to be, that they clearly are not sustainable on the ground of the defence of purchase for value without notice being unavailing against a legal title, and that the opposite views of Lord St. Leonards and Lord Westbury render it doubtful whether they can be supported on the ground of the application having been to the concurrent jurisdiction of the Court.

Having regard to the difference of opinion between two such great authorities, and to the absence of anything showing conclusively that Sir John Leach's decision was really founded on the circumstance of the invoked jurisdiction being concurrent, it may be permissible to point out that, if the true principle in such cases be (as contended for by Mr. Roper) that the Court of Equity is to afford the plaintiff the same

relief as, but no more than, could be obtained at law (for instance, as established by *Gomm v. Parrott* (a), no discovery), the natural course for the Court of Equity to take would seem to have been to say: we can certainly do no more for you against the purchaser for value than could the Common Law Courts, and so, instead of involving ourselves in repeated discussions, at various stages of the litigation, as to whether this thing or that thing is or not in excess of your remedies at law, we will leave you to assert your title in the Common Law Courts.

(a) 3 Common Bench, N. S. 47. See p. 411, ante.

CHAPTER II.

WE proceed now to Lord Westbury's second class of cases, that of several purchasers or incumbrancers claiming in equity, of whom one who is later in time has succeeded in obtaining an outstanding legal estate, in which cases, Lord Westbury says, the principle is that a Court of Equity will not disarm a purchaser.

The first mention of this doctrine occurs three years earlier than the decision of *Bassett v. Nosworthy* (the leading case in respect to our first class), and the cradle of it may be said to be *Marsh v. Lee* (a), which was decided by Lord Keeper Bridgman, with the assistance of Lord Justice Hale (then Chief Baron) and Rainsford, J., in the year 1670, and it was on that occasion, as it is believed, that Lord Hale made use of the expression so often since referred to of "*tabula in naufragio*."

The doctrine applies both to purchasers, in the ordinary popular sense of the word, and to mortgagees who are partial purchasers.

The most frequent occasions for its application are

(a) 2 Ventris, 337, s. c. 1 Cases in Chancery, 162.

the cases of, first, a mortgage, and then a sale suppressing the mortgage, or of several consecutive mortgages, some one or more of the earlier being concealed on the occasion of a later one being made.

The most familiar statement of the doctrine as applied to the particular instance of several mortgages, is to be found in *Brace v. Duchess of Marlborough* (a), decided by Sir Joseph Jekyll, who there laid down, “1st. That if a third mortgagee buys in the first mortgage, though it be pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*.

* * * * *

“But, 6thly, his Honour said in all these cases it must be intended that the *puisne* mortgagee, when he lent his money, had no notice of the second mortgage.”

The case supposed here by Sir Joseph Jekyll is that of a *puisne* mortgagee getting in the first legal mortgage, but the doctrine applies equally wherever the purchaser or mortgagee, whose title is later in point of term, has acquired any legal estate, subject to the qualification which we shall presently find to exist in

(a) 2 Peere Williams, 491.

those cases in which the legal estate has been obtained, not from a mortgagee, but from a trustee.

In connection with this branch of the subject, let us first consider the distinction which exists between a first legal mortgagee and a person in whom a legal estate is vested as trustee.

A mortgagee is not trustee for his mortgagor, still less is a first mortgagee a trustee for a second mortgagee.

A second mortgagee may, if he think fit, give notice to the first mortgagee of his own mortgage, but that notice cannot in any way fetter the right of the first mortgagee to transfer his mortgage to any one, and as he may think fit. If this were not so, the rights of the first mortgagee, as existing immediately after taking his mortgage, would be diminished and prejudiced by the subsequent act of the mortgagor. It follows, therefore, that so long as the first mortgage is unsatisfied, so long may the first mortgagee transfer it to any one, and consequently to a third mortgagee, so as to enable the latter (if he had no notice of the second mortgage at the time of taking his own security) to squeeze out the second mortgagee (*a*).

There is one restriction only on this general right to transfer. The transfer cannot be made after a decree in a suit for foreclosure, or for otherwise determining the rights of the various incumbrancers (*b*). Nothing, however, short of a decree is sufficient to

(*a*) See *Peacock v. Burt*, 4 Law Journ. N. S. Chanc. 33; *Bates v. Johnson*, *Johnson's Reports*, 304, pp. 317, 318.

(*b*) *Wortley v. Birkhead*, 2 Vesey, senior, 571.

restrict the right, not even a submission by a first mortgagee made by answer in a suit instituted against him by a second mortgagee, to assign his security on being paid the amount due to him (a).

Suppose, however, a mortgagee to have been paid everything that is due to him on his mortgage without reconveying, and without any bargain or undertaking on his part to transfer his security, what is his position? It is that of trustee for the mortgagor, or for the various incumbrancers according to their legal priorities. It differs to some extent from that of an express trustee, because the express trustee must know, or at least is presumed to know, the contents of the instrument declaring the trusts on which he holds; whereas the satisfied mortgagee may be only partially acquainted with the incumbrances executed by his mortgagor, and so far as he has no notice of them, cannot be affected with the duties of a trustee towards the unknown incumbrancers.

Subject to the foregoing qualification, a satisfied mortgagee may be treated for the purpose of the following discussion as a trustee.

Let us now consider the cases in which the later purchaser or incumbrancer has obtained the legal estate from a trustee.

Some of the old decisions seem, at one time, to have favoured the view that a *bonâ fide* purchaser for value who had no notice at the time when he paid his money, or gave his money's worth, was entitled to protect any

(a) *Belchier v. Butler*, 1 Eden, 523, 5 Tomline P. C. 292.

subsequently discovered infirmity in his title, per *fas aut nefas*, even by fraud or theft.

Thus, in *Huntington v. Greenville* (a), we find Lord Chancellor Nottingham referring to Sir John Fagg's case, "where he (Sir John Fagg), being a purchaser, "came into a man's study, and there laid hands on a "statute, that would have fallen on his estate, and put "it up in his pocket; and in that case, he having "thereby obtained an advantage at law, though so "unfairly and by so ill a practice, the Court would not "take that advantage from him."

It is clear that such a decision as that said to have been come to in Sir John Fagg's case could not be tolerated. No man could be allowed to reap a benefit from fraud or malpractice.

Accordingly, within only ten years after the reference made by Lord Nottingham to Fagg's case, we find it distinctly established that a purchaser for value without notice cannot even avail himself of a legal estate voluntarily conveyed to him where the conveyance is a positive known breach of trust on the part of both the conveying party and the purchaser for value.

The leading authority on this point is *Saunders v. Dehew* (b).

There, Ann Bayly, being possessed of a term of years, made a settlement under which her daughter Isabella took a life estate. Isabella made a mortgage, professing to be entitled to the property absolutely.

(a) 1 Vernon, 49.

(b) 2 Vernon, 271.

Then the mortgagee, discovering that Isabella had no title, got an assignment of the term from the trustees, and filed a bill to foreclose, and it was held that the mortgagee could not avail herself of the legal estate thus acquired.

The Court said: "Though a purchaser may buy in
" an incumbrance, or lay hold on any plank to protect
" himself, yet he shall not protect himself by taking a
" conveyance from a trustee after he had notice of the
" trust; for by taking a conveyance with notice of the
" trust he himself becomes the trustee, and must not,
" to get a plank to save himself, be guilty of a breach
" of trust."

If, then, a purchaser for value cannot protect himself by means of a legal estate obtained from a trustee in breach of trust, with full knowledge of both parties, the question is, when may he protect himself by means of a legal estate obtained from a trustee?

We propose examining in detail this question which seems to have been partially obscured by reason of the expressions used in its discussion in certain cases having been treated as applicable to others in which the circumstances were materially different.

And, first, it is to be noticed that in *Saunders v. Dehew*, which we have used by way of preface, so to speak, the legal estate was acquired by a transaction subsequent to and distinct from that upon the occasion of which the purchaser for value paid his money.

Before considering cases of that description, let us first consider those in which the legal estate is acquired as part of the very same transaction.

Now, when a trustee either upon express trust, or being a person in whom a legal estate is vested but not as an express trustee, concurs in a conveyance or mortgage by the alleged equitable owner to a purchaser or mortgagee, he may do so under the following four different states of circumstances:—

1. The trustee and the purchaser or mortgagee may both be aware of the trust, and the conveyance or mortgage may be made in defiance of this knowledge.
2. They may both be ignorant.
3. The trustee may know of the trust, and the purchaser or mortgagee may be ignorant.
4. The trustee may be ignorant, and the purchaser or mortgagee may have knowledge.

The first of these supposed states of circumstances gives rise, where the whole transaction is contemporaneous, to no room for discussion. The purchaser or mortgagee knew everything from the beginning, and is really not a purchaser without notice. *Willoughby v. Willoughby* (a), the case to which we owe the celebrated and elaborate judgment of Lord Hardwicke, was, in one of its main features, a case of the description first supposed.

The second state of circumstances, though almost impossible where the trustee holds upon an express trust, may well arise where the trustee is a person in whom, in consequence of a prior mortgage having been satisfied, a dry legal estate is vested without notice of

(a) 1 Term Reports, 763.

the true equitable title. It did, in fact, arise in the case of *Jones v. Powles* (a).

There one Jones, who was seised in fee, made, in 1800, a legal mortgage. This mortgage was paid off in 1808, but no reconveyance was taken, so that the legal estate was left outstanding. In 1814, Jones died. At his death, one Meredith took possession of the property, claiming under a will of Jones, which, though proved in the Ecclesiastical Court, was, in fact, forged. Shortly after Jones's death, Meredith borrowed money on the security of the property, and, on that occasion, the mortgagee of 1800, in whom the legal estate was outstanding, concurred in conveying to the new mortgagee. There were various further advances, transfers, and other transactions; some before, some after, notice that the will was a forgery; and it was held that as to all moneys paid by the defendant before notice, the defence of purchase for valuable consideration without notice must apply, and that the accounts must be taken as against the plaintiff, who claimed under the true title, on that footing.

The third state of circumstances, viz., that of the trustee who concurs in the conveyance or mortgage, having knowledge, while the purchaser or mortgagee is ignorant of the trust, implies, of course, positive fraud on the part of the trustee. In such a case it is clear that the purchaser or mortgagee is entitled to the protection of the legal estate thus acquired by him in innocence on his part. This is distinctly established

(a) 3 Mylne & Keen, 581.

by the recent decision of *Pilcher v. Rawlins* (a); we ought, perhaps, to say decisions, for there were two distinct fraudulent transactions, the circumstances of both of which fall under this our third head.

The facts of the first transaction were as follows:—A. B. mortgaged to three trustees (the trust being disclosed), of whom C. D. was the survivor. C. D., without consideration, fraudulently released to A. B., and then A. B., suppressing both mortgage and reconveyance, mortgaged to E. F. for value and without notice, and it was held that E. F. had priority.

In the second transaction there was, as in the first, a mortgage by A. B. to three trustees (the trust being disclosed), of whom C. D. was the survivor. Then A. B. executed to C. D. a purchase deed, which was in effect a sham, no money passing, and C. D. professing to be absolutely entitled under the sham deed, and having in fact the legal estate as surviving mortgagee, mortgaged to G. H. without notice of the first mortgage, and it was held that G. H. had priority.

It was argued in each case that the title to the legal estate being traceable only through deeds (in the first case the valid mortgage and fraudulent release, and in the second the valid mortgage alone) which disclosed the trust, the respective mortgagees E. F. and G. H. must be deemed to have had notice of the trust; but that view, though upheld by the Court of first instance, was considered untenable on appeal; and it being thus settled that E. F. and G. H., who were in fact

(a) L. R. 11 Eq. 53, 7 Ch. 259.

ignorant, were not affected by constructive notice, the result, as stated under our third head, followed as of course.

Here we may conveniently notice some observations of Lord Hardwicke in his judgment in *Willoughby v. Willoughby* (a), which seem to have been considered by Lord Eldon as presenting considerable difficulty; but which are, it is submitted, perfectly clear and consistent, if they are regarded as applied not to a case where the legal estate is got in by a transaction subsequent to that on the occasion of which the money was paid; but (as was the case in *Willoughby v. Willoughby*) as part of the original transaction.

Lord Hardwicke, after referring to the position of trustees to preserve contingent remainders, says: "It is just the same here. If the *puisne* purchaser or mortgagee has notice of the prior purchase or incumbrance, he shall not avail himself of the assignment of the term (b), but shall be decreed to reconvey or procure it to be reconveyed. If he has no notice, he must retain it; but if the trustee who joined in the assignment had notice of such prior purchase or incumbrance, his conscience was affected by the trust, it was a breach of trust in him; and he ought to be decreed to make satisfaction. This is in my opinion what equity would demand."

In reference to these words (for it is assumed that to

(a) 1 Term Reports, 763; see page 771.

(b) In the particular instance before Lord Hardwicke, the legal estate of which the person who alleged himself (but was held not to be) a purchaser for value without notice claimed the benefit, was a term of years.

them reference was intended to be made), we find Lord Eldon saying (a): "One of the greatest difficulties I met with in deciding the case of *Maundrell v. Maundrell*, was Lord Hardwicke's expression, that the purchaser would be safe in taking the assignment, if he could get it; but his Lordship would not say the trustee would be safe. Surely if the purchaser would be safe the trustee ought to be so."

Unless there be some misconception on the part of the present writer as to the particular observations of Lord Hardwicke to which reference was intended to be made, it is submitted that the whole difficulty arises from treating them as having been made in respect to the operation of getting in a legal estate from a trustee, by a transaction separate and distinct from the original purchase or mortgage, instead of to a case where the legal estate is obtained as part of the original transaction.

The fourth state of circumstances does not, so far as the writer is aware, occur in any reported case; but it seems clear upon principle that the purchaser or mortgagee could in no sense be a purchaser for value without notice, and could not therefore be protected by any legal estate so acquired.

We pass now to the consideration of the cases in which the legal estate is acquired from the trustee by a transaction subsequent to and distinct from that of the original purchase or mortgage.

(a) *Ex parte Knott*, 11 Vesey, 609, see p. 613; and see observations of Lord Hatherley in *Carter v. Carter*, 3 Kay & Johnson, 617, at p. 640.

Here, again, we may have the same four states of circumstances as those mentioned in reference to the contemporaneous acquisition of the legal estate (a).

The first, where both trustee and purchaser or mortgagee knew of the trust, is the case of *Saunders v. Dehew* (b), mentioned at the outset, and no advantage is acquired by the purchaser for value.

The second and third states of circumstances might possibly occur in respect to a transaction by which a legal estate is acquired subsequently to the original purchase or mortgage, and if they should so occur, then, upon all principle, the result must be the same as where the legal estate is acquired under the original transaction; but of course, if it be supposed that the subsequent transaction takes place after discovery by the purchaser or mortgagee of the faultiness of his own title, and of the fact that the true equitable title lies elsewhere, these second and third states of circumstances fail to exist, and may be discarded from our consideration.

This brings us to the fourth state of circumstances in which the trustee is supposed to be ignorant (say is the legal representative of a former satisfied mortgagee who knows nothing of the subsequent equitable title), while the purchaser or mortgagee has discovered the infirmity of his own title, and is aware of the existence of a prior equitable title in some one else.

The distinction between this case and that where the fourth state of circumstances occurs in connection

(a) See page 423, ante.

(b) 1 Vernon, 49.

with a conveyance from the trustee, as part of the original purchase or mortgage transaction, is obvious. In the latter, the purchaser or mortgagee parted with his money with knowledge that the person conveying the legal estate was trustee for some one else. He is, as already stated, in no sense a *bonâ fide* purchaser for value without notice.

In the former case he does undoubtedly fill that character, and the only question is, whether he is at liberty to avail himself of the ignorance of the trustee to protect the original transaction, which was in every respect *bonâ fide*.

The head and front of his offending consists only in concealing from the trustee facts which, if disclosed, would show the trustee that he ought to convey not to the purchaser, but to some other person.

Does this concealment vitiate the transaction? It is conceived not. In the eye of a Court of Equity the purchaser is, in a certain sense, considered to have an equal equity with the claimant prior in time. The trustee conveying as he does, in ignorance of the true title of which he has no notice, violates no duty, and incurs no liability; and the purchaser or mortgagee acquires and holds the legal estate as a plank in shipwreck.

This view is supported by the judgment of Lord Hatherley, when Vice-Chancellor, in *Carter v. Carter* (a), who after referring to *Saunders v. Dehew*, there says, that the authorities he had found on the subject

(a) 3 Kay & Johnson, 617, see p. 642.

resulted in this distinction, "that although you may
" get in any outstanding legal estate which a person
" may *bonâ fide* assign to you, you having notice of
" the intervening incumbrance, *he not having any such*
" *notice*, you cannot procure a conveyance from a
" trustee who himself has an adverse duty to per-
" form, and who, by such conveyance, would in fact
" be making over the estate to you to protect you
" against the very interests which it was his duty to
" protect."

The conclusion arrived at is, however, not free from difficulty, and we find Lord Justice James thus expressing himself on the subject in a recent judgment:
" But those cases where the person seeking the
" conveyance, knew the fact that the trustee was
" trustee for somebody else, and could not convey
" without a breach of trust, whilst the trustee was
" left in ignorance; those cases, I say, involve a
" principle I have never been able to understand " (a).

We will now consider two material distinctions between Lord Westbury's second class of cases and the first class.

First.—Under the first class, as we have seen, the person setting up the defence has, as a rule, no legal title, and often no title at all; whereas, under the second, the defence is available only where the mortgagee or purchaser setting it up has actually obtained a legal estate. By the seventh resolution in *Brace v. Duchess of Marlborough* (b), the law on the subject is

(a) *Pilcher v. Rawlins*, L. R. 7 Ch. 260, see p. 268.

(b) 2 *Peere Williams*, 491, see p. 496.

thus laid down:—" In this case it appeared that a
" *puisne* incumbrancer bought in a prior mortgage in
" order to unite the same to the *puisne* incumbrance,
" but it being proved that there was a mortgage prior
" to that, the Court clearly held that the *puisne* in-
" cumbrancer, where he had not got the legal estate,
" or where the legal estate was vested in a trustee,
" could there make no advantage of his mortgage, but
" in all cases where the legal estate is standing out,
" the several incumbrances must be paid according to
" their priority in point of time ; *qui prior est in tempore*
" *potior est in jure.*"

The foregoing statement of law was adopted by Lord Hardwicke in *Willoughby v. Willoughby* (a), where he says : " Wherever the legal estate is standing out,
" either in a prior incumbrancer, or in such a trustee
" as against whom the *puisne* incumbrancer has not the
" best right to call for the legal estate, the whole title
" and consideration is in equity, and then the general
" maxim is '*qui prior est tempore potior est jure.*' "

This doctrine received a strong application in the case of *Rooper v. Harrison* (b), decided by Lord Hatherley when Vice-Chancellor, in which a first mortgage with power of sale, and a third mortgage taken without notice of a second, became both vested in the same person, and that person having sold the mortgaged property under the power, it was held that there being no longer any legal estate vested in the third mortgagee, the surplus proceeds of sale, after satisfying the

(a) 1 Term Reports, 763 ; see p. 773.

(b) 2 Kay & Johnson, 86.

first mortgage, could not be retained in satisfaction of the third mortgage, but must go to the second mortgagee.

There Lord Hatherley, after explaining in detail (a) how the legal estate acquired by a subsequent incumbrancer is made available as a *tabula in naufragio*, concludes by saying, "All that is a very peculiar part of this doctrine, but the Court has never gone beyond this; and if it does not find the legal estate interposed, it deals with the money according to the priorities."

Finally, the doctrine was made by Lord Westbury the foundation of his decision in *Phillips v. Phillips* (b), in which he held that a purchaser for valuable consideration (marriage in the particular instance) without notice of a previously granted annuity, could not, the whole legal estate being outstanding in previous incumbrancers, and the interest of the annuitant and the purchaser being alike equitable, rely effectually on the defence of purchase for value without notice against a bill by the annuitant to enforce payment of his annuity.

This portion of the decision was, equally with that which relates to *Williams v. Lambe* and *Collins v. Archer* (c), dissented from by Lord St. Leonards on the ground that the question in *Phillips v. Phillips* was not one of settling priorities, but of affording relief in a contest between adverse equitable claimants (d).

(a) 2 Kay & Johnson, 108, 109.

(b) 4 De Gex, Fisher & Jones, 208.

(c) See pp. 414, 415, ante.

(d) See Vendors & Purchasers, 14th Ed. 797.

In reference to a difference of view between such great authorities, perhaps we ought to say "*non nostrum &c.*;" but to the writer it seems that the suit was virtually one to adjust the rights over the property in question of persons claiming in equity only, and that the doctrine "*qui prior est tempore, &c.*," was correctly applied.

This much seems clear, that if the prior legal incumbrancers had filed a foreclosure bill, a right of redemption must have been given to the annuitant in priority to that given to the subsequent purchaser.

Secondly.—Lord Westbury's observation in reference to this second class (*a*), where he says that the principle is, that a Court of Equity "*will not disarm a purchaser,*" falls considerably short of a full statement of what equity does for a purchaser; for in cases under the second class, equity not only does not disarm him, but actually gives him priority and precedence by reason of the legal estate which he has acquired.

The Court does not, as in cases arising under the first class, simply say to the plaintiff, "we dismiss your bill, we will give you no assistance against the purchaser for value without notice," but it marshals the rights and administers the property which is the subject of litigation on the footing of the purchaser or mortgagee who has acquired the legal interest having actually the first claim.

(*a*) Phillips v. Phillips, 4 De Gex, Fisher & Jones, 208, see pp. 217, 218.

This difference, of course, is attributable to the different natures of the suits.

In cases arising under the first class, the plaintiff says: "I want assistance." The Court says: "We cannot give it as against a purchaser for value without notice; you must make what you can of your legal right without our assistance."

In the second class of cases, there are various equities attaching to the property under litigation, and the Court could not stay its hand altogether without leaving everything in hopeless confusion, and doing absolute injustice.

This distinction between the two classes of cases is well illustrated by the case of *Finch v. Shaw* (a), decided by Lord Romilly; and on appeal in the House of Lords (b).

The facts material for our purpose are very short.

A first legal mortgagee filed a bill against a second mortgagee for foreclosure. Amongst other defences the second mortgagee set up that of his being a purchaser for value without notice.

The argument in support of the defence was somewhat singular. It had been settled, as we have seen in our discussion (c) of *Williams v. Lambe* and *Collins v. Archer*, that the defence is a good defence, although a plaintiff may come into equity relying on a legal title; and the contention now was that in all cases

(a) 19 Beavan, 500.

(b) *Colyer v. Finch*, 5 House of Lords Cases, 905.

(c) See pp. 403—408, ante.

where the plaintiff came into equity relying on a legal title the defence was a valid defence, and the plaintiff could have no relief in equity; or in effect that the simple circumstance of the title of the plaintiff being legal, was sufficient to prevent the Court from giving him any relief against a purchaser for value without notice.

It was urged that by the decisions, and more particularly that of Lord Romilly himself in *Attorney-General v. Wilkins(a)*, the mortgagee, his title being a legal title, must be left to his remedies at law.

Lord Romilly, in his judgment, after reiterating his view that the defence of purchase for value without notice, applied as against a legal right as well as an equitable right, proceeded to discuss the applicability of the defence to cases of mortgage, and continued thus (b):—

“ In this case, suppose the legal estate was out-
“ standing, and that the question was between two
“ equitable incumbrancers, both of whom had ad-
“ vanced their money without any notice of any
“ incumbrance on the estate, and therefore exactly
“ under the same conditions; if the conduct of the
“ parties were the same, I should give priority to the
“ one who advanced his money prior in point of time.
“ Then could the rights and situation of the first
“ mortgagee be in the least diminished or injured if
“ he had, in addition, obtained the legal estate, or is
“ the doctrine of a purchaser for valuable consideration

(a) 17 Beavan, 285.

(b) 19 Beavan, 508.

“ without notice applicable to that state of things ?

“ In my opinion it is not.”

Then, after referring to *Williams v. Lambe* and *Collins v. Archer*, in terms which impliedly treat them as well decided, Lord Romilly continues thus :—

“ The distinction, I apprehend, is this : if the suit
“ be for the enforcement of a legal claim or the
“ establishment of a legal right, then, although this
“ Court may have jurisdiction in the matter, it will
“ not interfere against a purchaser for valuable con-
“ sideration without notice, but leave the parties to
“ law ; if, on the other hand, the legal title is perfectly
“ clear, and attached to that legal title there is an
“ equitable remedy or an equitable right which can
“ only be enforced in this Court, I have not found any
“ case, nor am I aware of any, where this Court will
“ refuse to enforce the equitable remedy which is
“ incident to the legal right (a).”

Further on Lord Romilly points out that although at that moment the plaintiff (Colyer) was unable to bring ejectment by reason of the existence of a prior term securing an annuity, that term might cease at any time, and then upon the plaintiff recovering the

(a) This passage seems to have been intended to suggest a ground on which the decisions in *Williams v. Lambe* and *Collins v. Archer* might be supported, and at the same time might in their turn serve to strengthen the decision subsequently arrived at in the principal case. If so, Lord Romilly here regards the right of foreclosure as an equitable right attached to the legal estate in the mortgagee. It is submitted that it would be more correct to view it as a right, correlative to that of redemption, imported, equally with the latter, into the mortgage contract by Courts of Equity, and to consider the legal estate as an adjunct to the equitable right.

estate, a bill might be filed against him for redemption, and says: "If I am not to interfere to grant foreclosure to Mr. *Finch*, am I to interfere to grant redemption to Mr. *Colyer*? * * * *"

"It appears to me impossible for any Court to come to such a conclusion."

Accordingly Lord Romilly made the usual decree for foreclosure (a).

On appeal to the House of Lords (b), the decision at the Rolls was upheld. Lord Cranworth (Lord Chancellor), in moving the judgment of the House, after stating his agreement in the doctrine "that the principle on which the Court protects a purchaser for valuable consideration without notice, is not confined to the case of a purchaser for valuable consideration who has got the legal estate," said: "But I think that that doctrine cannot by possibility apply to the case of a Bill of foreclosure, and there are reasons for so holding pointed out by the *Master of the Rolls* in his judgment, reasons which are no doubt perfectly satisfactory, but I should proceed on a much shorter ground. For the purpose of the question whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration with-

(a) See *Heath v. Crealock*, L. R. 10 Ch. 22, which decision must be considered as founded on the same principle as *Finch v. Shaw*.

(b) *Colyer v. Finch*, 5 House of Lords Cases, 905; see p. 921.

“ out notice, that that purchaser can at any time file a
“ bill to redeem the mortgage; and, that being so, it
“ would be most unjust if there was not a correlative
“ right on the part of the mortgagee to say, ‘ *you shall*
“ *redeem now, or you shall never redeem.*’ ”

Lord Cranworth does not advert to the circumstance, that after the conclusion is reached that the defence cannot be set up as a complete bar to a foreclosure suit, the question whether a purchaser for value has or has not a legal estate, becomes all important; but this is accounted for by the fact that, in the particular case before him, the legal estate was in the plaintiff.

The substance of the decision is, it is conceived, this: that by the effect of the mortgage certain equitable rights and liabilities were created which a Court of Equity could not, without injustice, refuse to recognise and adjust; and that the fact of the plaintiff having the legal estate could afford no just ground for refusing to adjust the equitable rights.

CHAPTER III.

WE now come to Lord Westbury's third class of cases, which he describes as those in which there are circumstances that give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud or mistake.

In these cases the rule of the Court of Equity is, it is conceived, this: that it will not exercise its special jurisdiction to remedy fraud or mistake to the prejudice of a purchaser for value.

In this third class of cases the defence applies equally, whether the purchaser has only an equitable or a legal estate.

It is not meant by this that his position is as strong in the former case as in the latter, because the absence of a legal estate may cripple his power of defending himself at law; what is meant is, that the possession by him of a legal interest is not needed, as in the second class, to make the defence available.

We may take, as an instance of the third class, *Bowen v. Evans* (a), decided by Lord St. Leonards, when Lord Chancellor of Ireland.

(a) 1 Jones & Latouche, 178; see pp. 263, 264.

The facts there were very complicated, but the case may be represented generally as being one of a bill filed by a remainderman in tail to set aside a sale of the settled estate by the tenant for life as having been effected by fraud. Amongst the defendants to the suit were certain persons claiming, as purchasers for value without notice, equitable interests only. In reference to these defendants, Lord St. Leonards thus expressed himself:—

“It appears that Mr. G. E. Bruce” (the original purchaser) “granted, by way of settlement for valuable consideration, a rent-charge secured by a term to be issuing out of this property before he obtained a conveyance of the legal estate; and it was insisted that the purchaser, having no notice of the fraud, had an estate which ought not to be impeached in this Court. It was not denied that, he being a purchaser for value without notice, though of an equitable interest only, the bill must be dismissed as against him, with costs; and though there is a difference of opinion on the point whether a purchaser of an equity without notice can protect himself in this Court as a defendant against the legal title (a), yet, in my opinion, whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title.”

(a) This refers to the question discussed at pp. 404—408, ante.

Amongst older cases establishing the same doctrine, though without any special reference therein to the question whether the purchaser's estate was legal or equitable, we may cite *Malden v. Menill (a)*, in which it was held by Lord Hardwicke that where a *bonâ fide* purchaser for value without notice is concerned, equity will not interfere to grant relief in favour of a party, though he has acted in ignorance of his title upon a mistake of law.

So, again, in *Bell v. Cundall (b)*, which was a bill to rectify a mistake in the body of a common recovery of a copyhold estate, the name of the vouchee having been inserted instead of the name of the tenant, and so *vice versâ*; and in which the fact of mistake was apparent from a memorandum in the margin of the record in the handwriting of the steward of the manor, in which the names of the parties were correctly given; there, upon its appearing that the remainderman had, upon the foot of the mistake in the recovery, got possession of the estate, and sold it for valuable consideration, Lord Hardwicke declined to give any relief.

To this same class of cases must also, as it is considered, be referred that of *Penny v. Watts (c)*, as decided in the Court of first instance.

The object of the bill in that case was to establish and obtain performance of an agreement by which, in consideration of a niece giving up a legacy of £2,000, to which she was entitled under her uncle's will, the uncle's widow engaged to convey certain lands to her.

(a) 2 Atkyns, 8.

(b) Ambler, 102.

(c) 2 De Gex & Smale, 501.

To this bill the defence of purchase for valuable consideration without notice was set up by the widow's second husband, claiming under an ante-nuptial settlement made on the occasion of the second marriage.

The legal estate in the land, or some portion of the land, to which the litigation related, was outstanding in a mortgagee, and it was contended that in consequence the defence was not available; but Vice-Chancellor Knight Bruce held that the defence was available, notwithstanding the legal estate might not have been acquired under the settlement.

The case was appealed, and on appeal (*a*), Lord Cottenham thought there was sufficient evidence of constructive notice of the agreement to warrant the direction by him that certain issues should be tried. Ultimately the case was compromised; but the decision of Vice-Chancellor Knight Bruce on the point of law remains.

The reported cases falling within the third class are not numerous, and the distinction between the cases where the plaintiff comes to enforce an equity and those where he comes founding himself on an equitable estate may occasionally be somewhat thin.

Take as an example a suit for specific performance.

A., let us suppose, sells land to B., and then sells the same land to C. without notice, and then B. takes proceedings against A. and C. to enforce his contract, whereupon C. pleads that he is purchaser for value without notice.

(*a*) 1 Macn. & Gor. 150.

Now, according to one familiar mode of stating the relation between A. and B., A. became, after the sale to B., a trustee for B., and it may be said that B. comes to the Court founding himself upon his equitable estate. The other view would be, that he comes relying on an equity rather than an equitable estate.

The distinction is immaterial, assuming C. to have taken his conveyance, and obtained thereby the legal estate without notice, because, then, even adopting the first view, the case is simply that of a purchaser who, simultaneously with the payment of his purchase-money, has obtained from a trustee a conveyance made by the latter in breach of trust on his part, but with perfect innocence on the part of the purchaser (a).

Suppose, however, that C. has paid his purchase-money and obtained a conveyance which does not carry with it the legal estate. Will the defence protect C. who has an equitable title only?

It is conceived that it ought, more especially as the jurisdiction in specific performance is one which the Court of Chancery has often declined to exercise in cases where a decree would entail hardship.

(a) See p. 424, ante.

CHAPTER IV.

HAVING now examined the three classes of cases mentioned by Lord Westbury to which the defence applies, we will endeavour to extract from them some rule or principle.

The first observation that occurs is, that Classes I. and III., though differing in certain respects, are more akin to one another than is either to Class II.

In Class I. the Court of Equity was asked to give to the owner of a legal interest some equitable remedy or assistance not obtainable at law, and the answer was:—"Against a purchaser for value without notice we will give no assistance." In Class III. the Court was asked to exercise some exceptional head of equity jurisdiction founded on fraud, accident, or mistake, and the Court declined to exercise it. In both classes of cases the mode in which the Court gave effect to the defence was by simply declining to exercise any jurisdiction whatever—in other words, by dismissing the bill.

In Class II., on the other hand, the Court did not decline to exercise jurisdiction, but, while exercising it, contrived to give the purchaser for value the benefit of any legal advantage he had acquired.

We have already indicated (*a*) what we conceive to be the true ground for the different course of action adopted by the Court in these different cases.

Where, for instance, property is mortgaged to (say) A., B., C., and D., in succession, and one or more of the later mortgagees fills the character of a purchaser for value without notice, the Court cannot say: "We will do nothing; settle your disputes at law," for this would be equivalent to holding that the various rights and equities in respect to foreclosure and redemption should be disregarded altogether. The first legal mortgagee would recover possession and hold the property absolutely.

In other words, the case is one in which the Court must, in order to avoid chaos, exercise its jurisdiction, and the only question is, on what terms as respects the purchaser for value it shall be exercised.

The different mode of action adopted by the Court in reference to these classes of cases suggests that the true primary division of our subject lies between the cases in which the Court declines altogether to exercise jurisdiction and those in which it does not so decline.

If we can define the latter, the next step will be to distinguish between the cases in which the Court, though exercising jurisdiction, accords some advantage to the purchaser for value without notice and those in which it does nothing for him.

Now, it is submitted that the question, whether the

(*a*) See p. 434.

Court is to exercise or to decline jurisdiction depends, not upon whether the plaintiff comes claiming under a legal or an equitable title, nor, indeed, upon the nature of the title set up by the purchaser for value, but on the nature of the suit.

If the suit is, as in those falling under Classes I. and III., of such a description that the matter can be conveniently disposed of by simply declining all action whatever, that course will be adopted, but if, on the other hand, the suit be one for the determination and adjustment of equitable rights and estates in reference to property, and the effect of the Court doing nothing would be to leave these rights and estates undetermined and unadjusted, the Court will not decline jurisdiction.

Thus in the cases, adverted to in the outset (a), in which there is a fund to be administered, in the cases falling under Class II. already discussed, and in many others, the Court cannot properly decline jurisdiction.

We have next to distinguish the cases in which the assumption of jurisdiction by the Court results in rendering the defence of purchase for value without notice wholly unavailing, and those in which, although jurisdiction is assumed, it is exercised in such a way as to give the purchaser the benefit of the defence.

Under the former head will fall all those cases in which the Court is distributing or administering a fund, and those also in which the whole legal estate being outstanding, and the estates and interests to be

(a) See p. 390, ante.

determined and adjusted being all purely equitable, the maxim "*qui prior est tempore, potior est jure*" governs the right (a).

Under the latter will fall those cases already considered under Class II., in which the purchaser for value has obtained the protection of a legal estate; and the same principle must, it is conceived, be applied to other suits enforcing equitable rights.

To illustrate our view of the action of the Court and of the applicability of the defence in a case not falling within either the first or the third class, let us suppose that the head of jurisdiction which the Court of Equity was requested to exercise was that of "*Partition.*"

In such a case, the Court could not properly decline jurisdiction without leaving the rights of the various tenants in common undetermined and unadjusted, and saying in effect that they should remain tenants in common, although the law had made provision for their release from that undesirable condition. The Court must, therefore, it is conceived, have assumed jurisdiction, notwithstanding that the defence of purchase for value without notice might be set up by a defendant.

Next let us consider the effect and result of the Court assuming jurisdiction.

We will suppose for this purpose that the bill was by a person claiming three-fourths of the property, and, first, let it be assumed that the whole legal estate was outstanding in some trustee or paramount mortgagee. In such a case it would have been of no avail

(a) See pp. 430—433, ante.

for one of the defendants to say, "I am purchaser
" for value without notice of the whole property,
" and, therefore, you are entitled to no decree."
Nor would it have been of any use to say, "I purchased
" one moiety for value without notice, and you, the
" plaintiff, can have a decree for partition only on the
" footing of your being entitled to one-half instead
" of three-fourths." The answer would be:—"The
" interests are all equitable, and you, the purchaser
" for value, have, after all, no higher right than the
" plaintiff."

If, however, the purchaser for value should have had vested in himself, or in some person expressly a trustee for himself, a legal title co-extensive with the equitable share or interest purchased by him, and larger than was compatible with the right or title asserted by the plaintiff, then, to that extent, his right must have prevailed, for the Court would not deprive him of any legal estate.

Of course, if the purchaser for value without notice had purchased and obtained the legal estate in the entirety, the result would be simple dismissal of the bill for partition, though not on the ground of the Court refusing to assume jurisdiction against the purchaser, but because, after assuming it, that form of decree would alone meet the exigency of the case.

If the purchaser for value without notice had purchased and obtained the legal estate in a moiety, then the plaintiff could have a decree for partition only on the footing of his being entitled to one-half of the property instead of three-fourths as claimed by him,

To sum up: the defence was an absolute bar where a Court of Equity was asked to afford assistance to the legal title by the exercise of some special kind of jurisdiction, such as discovery, removal of terms, &c., or where it was asked to exercise some special head of jurisdiction, such as those founded on fraud, accident, or mistake, but it was no such bar where the Court was merely asked to adjust the equitable rights of the plaintiff and others in the exercise of some head of ordinary jurisdiction, the exercise of which it could not have declined without leaving those rights unsettled and in confusion; but in the latter case, while assuming and exercising jurisdiction, it gave to any purchaser for value who might have acquired a legal estate, the full benefit of that legal estate, as an adjunct to his equitable right.

The foregoing is the nearest approach we have been able to make to the enunciation of any general rule or principle governing the defence.

It may be convenient before considering the applicability of the defence to litigation arising since the passing of the Judicature Acts, 1873 and 1875, to say a few words as to the meaning of the expressions, "*valuable consideration*" and "*without notice*;" but we shall be brief under these heads, because the primary object of this sketch is rather to show the circumstances under which the defence applies, assuming the defendant who is setting it up to be a purchaser for valuable consideration without notice, than to explain what constitutes such a purchaser.

As respects the meaning of the expression, "*valu-*

“*able consideration*,” the rule is the same as that which obtains in respect to cases arising under the 27 Elizabeth, cap. 4.

Of course, money or money’s worth is a valuable consideration, and so is marriage (*a*) ; so also any liability undertaken by the person acquiring the property.

And just as it has been held under the statute of Elizabeth, that if there be in fact a valuable consideration, the Court will not inquire into the *quantum* or amount (*b*) ; so it has been held with respect to this defence.

This was, in truth, one of the points decided in *Bassett v. Nosworthy*, in which Lord Nottingham, after alluding to the argument raised before him that the lands had been proved to have been of much greater value than the purchase-money paid, expressed himself thus (*c*) :—

“ That will not alter the case, because in purchases
“ the question is not whether the consideration be
“ adequate, but whether ’tis valuable ; for if it be such
“ a consideration as will make a defendant a pur-
“ chaser within the 21st Elizabeth (*d*), and bring him
“ within the protection of that law, he ought not to
“ be impeached in equity.”

On the other hand, it is perfectly clear that the

(*a*) *Harding v. Hardrett*, Rep. temp. Finch 9 ; *Jackson v. Rowe*, 2 Simons & Stuart, 472 ; *Penny v. Watts*, 2 De Gex & Smale, 501.

(*b*) See as to this the recent cases of *Townend v. Toker*, L. R. 1 Ch. 446 ; *Bayspoole v. Collins*, L. R. 6 Ch. 228.

(*c*) Reports temp. Finch 104.

(*d*) Obviously a printer’s error for 27th.

consideration must be valuable in the technical sense of the word, and that a merely good consideration, as natural love and affection, would not sustain the defence.

Next, as to the words, "*without notice.*"

The question, what is "notice?" is a very large one. It embraces questions arising upon the County Registry Acts, upon the Statute Law applicable to British ships, upon the complicated legislation affecting judgments and pending suits, and upon a variety of other matters not cognate to the immediate object of this sketch. It branches out into the question of actual notice to the purchaser himself, which may be regarded as the exception, and notice to his solicitor or agent, which is far more common—which last, if acquired by the solicitor or agent in the same transaction, is equivalent to notice to the principal. It passes thence to the difficult question, how far, and to what extent, knowledge of the solicitor acquired before his retainer by the client is to be imputed to the client so as to affect him with constructive notice? (*a*). It involves the question, how far knowledge or notice of facts which suggest the propriety of inquiry is, by putting the purchaser upon inquiry, to be deemed notice of what the purchaser, who fails to inquire, would have learnt if he had inquired? It involves the question of the absolute duty of the purchaser to make inquiry for the title deeds, and the consideration of what answer accounting for their

(u) Fuller v. Bennet, 2 Hare, 394.

non-production may be accepted as reasonably satisfactory.

To do justice to these various topics would require time and space at least equal to that already allotted to the immediate object of our sketch, and it is not proposed to discuss them here.

CHAPTER V.

It remains that we should say a few words in reference to the applicability of the defence to litigation arising in the Supreme Court, and for that purpose we will state somewhat more fully the enactments of the Judicature Act, 1873, to which we adverted at the commencement of our sketch.

The 24th section of the Judicature Act, 1873, enacts by sub-section (2) that if any defendant * * * * alleges any ground of equitable defence to any claim of the plaintiff * * * * the Courts and every judge thereof shall give to * * * * every equitable defence so alleged the same effect by way of defence against the claim of the plaintiff as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court *for the same or the like purpose* before the passing of the Act.

The 25th section of the Act enacts by sub-section (11) as follows :—“Generally in all matters not herein-
“ before particularly mentioned, in which there is any
“ conflict or variance between the Rules of Equity and
“ the Rules of the Common Law *with reference to the*
“ *same matter*, the Rules of Equity shall prevail.”

Now, in reference to the enactment of section 24, sub-section (2), it should be premised that, according to the more natural construction of the words used (though they may be capable of a larger one), the rule embodied in that sub-section confers a right of equitable defence only in cases in which the action brought in the Supreme Court is for some purpose, the same as or like to one for which before the Act a suit might have been instituted in the Court of Chancery; and it is conceived that it would not be legitimate in construing the rule first to assume the possibility of a suit in Chancery for the particular purpose, and then to consider what equitable defence might have been set up in that suit.

For instance, a damage cause in respect of collision at sea, seeking to enforce a maritime lien on the ship causing collision, could not before the Act have been instituted in the Court of Chancery, but only in the Admiralty Court, or in a County Court having Admiralty jurisdiction; hence to such a suit in the Supreme Court the defence of purchase for value without notice could not, according to our construction of the sub-section, be validly set up.

If this were otherwise, a most important alteration would have been introduced into maritime law, it being clearly established by that law (however widely such a result may differ from equity principles) that a purchaser of a ship for valuable consideration and without notice of the maritime lien, takes it subject to that lien (*a*); and it seems a more reasonable expo-

(*a*) *The Bold Buccleuch*, 7 Moore, P. C. C. 267; *The Europa*, 32 L. J. (N. S.) P. M. & A. 188.

sition of the rule to regard it as intended to preserve as nearly as may be the benefit of the defence, and not as introducing indirectly large and important alterations in the law.

Starting, then, from the general principle that the defence applies only where a suit for the same or the like purpose might have been brought in the Court of Chancery, let us consider some of the various kinds of actions that may occur.

As respects actions brought in the High Court of Justice with a view to obtain relief of the description embraced by either the second or the third classes of cases which we have discussed, there would seem to be no difficulty in applying the enactment of the Judicature Act. Such actions will, in point of fact, be almost invariably brought in the Chancery Division of the High Court; but even if such an action be brought in a Common Law Division, and retained there (by reason of the power of transfer not being exercised), still the construction of section 24, subsection (2), of the Judicature Act seems free from doubt.

The question is, Could such an action as that which has in fact been brought have been, before the passing of the Act, brought in the Court of Chancery *for the same or the like purpose?* and upon this question being answered in the affirmative, the same effect must be given to the defence as the Court of Chancery would have given to it.

On the other hand, to the large number of actions relating to matters in respect to which no suit could

have been brought in Chancery before the Act, the defence will, it is conceived, not apply.

Thus, for instance, chattels belonging to A. are stolen, and are purchased by B. for valuable consideration without notice, but not in market overt, and A. brings an action against B. to recover his property. In such a case the defence has, it is conceived, no application—or, at all events, no application as a defence to the whole action—unless, perhaps, the chattels were of such a description that no damages could compensate A. for their loss, in which last case a bill in Chancery to have them delivered up might have been sustained (a).

A doubt suggests itself, however, whether the defence, though not a defence to the whole action, may not be held valid to the extent of conferring upon a defendant who, in such an action, is called upon to answer interrogatories a right to say, “ I am “ a purchaser for value without notice, and I decline “ to answer.”

It is clear that, if we go back to the time when litigants in the Common Law Courts were dependent on the Court of Chancery for discovery, the defence would have been an answer to a bill for discovery in aid of an ordinary Common Law action.

Thus in *Hoare v. Parker* (b), which was a bill for discovery against a pawnbroker in aid of proceedings at law to recover plate which had been pledged by a

(a) See *Pusey v. Pusey*, 1 Vernon, 273 ; *Duke of Somerset v. Cookson*, 3 Peere Williams, 390.

(b) 1 Brown's Chancery Cases, 578.

person who had only a life interest therein, and had since died, the defendant pleaded purchase for valuable consideration without notice. The plea was overruled as being insufficient in form; but Lord Thurlow considered the defence, if sufficiently pleaded, a good defence, saying: "A purchaser without notice, and for a valuable consideration, is not bound in conscience to assist the right owner in the legal recovery of the subject purchased under such circumstances."

It is also clear that in the exercise of the special powers of compelling discovery conferred upon the Common Law Courts by the Common Law Procedure Act of 1854, the right to discovery, even when the whole of the proceedings were at Common Law, might be excluded by the defence of purchase for value without notice. This is illustrated by the case of *Gomm v. Parrott (a)*, which we have already discussed (*b*) in connection with *Williams v. Lambe*.

The Common Law Procedure Act of 1854, however, in terms made the right to discovery at Common Law co-extensive only with that in Equity; and the question is whether, under the Judicature Act, 1873, which contains no such express limitation of right, the result is or not the same.

If the preservation of the "*status quo ante*" is to be regarded as the key to the construction of section 24, sub-section (2), the answer to this question must, it is conceived, be in the affirmative.

(a) 3 Common Bench Reports, N. S. 47.

(b) Page 411, ante.

The words of that sub-section may, without unduly straining them, be made applicable by regarding the action brought as consisting of two distinct claims (that is to say)—a claim to the chattels, and a claim to have discovery respecting them.

For the first of these purposes, a suit could not have been brought in the Court of Chancery before the passing of the Act, but for the latter it might, and to the extent of the latter purpose the defence therefore may be held to apply.

From the class of actions last considered, representing what before the Judicature Acts would have been ordinary Common Law actions, we must, it is conceived, carefully distinguish actions which, although wearing the general aspect of Common Law actions, are in effect brought to obtain by means of the improved procedure of the Supreme Court, what before the Judicature Acts could have been obtained only by means of the Court of Chancery.

To such actions the defence, it is conceived, clearly applies.

Thus, suppose the facts which gave rise to *Wallwyn v. Lee* to be repeated.

Suppose an action to be brought in one of the Common Law Divisions of the High Court of Justice to recover from the innocent mortgagee of a fraudulent tenant for life the title deeds which the latter, representing himself to be owner in fee, had handed over simultaneously with the mortgage.

Here, it is conceived, the sub-section applies strictly and literally. A suit might have been brought in the

Court of Chancery for the purpose for which the action is brought, and the defence of purchase for value without notice is a defence not merely against giving discovery, but a defence to the whole action, except so far, indeed, as such action may embrace a claim for damages in default of recovery of the deeds themselves, to which last-mentioned claim the defence would be no answer.

The foregoing are the best conclusions which the writer has been able to arrive at in reference to the mode of determining whether the defence applies in any particular instance, and to the applicability of the defence in the particular instances discussed.

It must be admitted that these conclusions are not altogether satisfactory in result, and that the ascertainment of the applicability of the defence by means of inquiries into the nature and extent of the old Chancery jurisdiction must occasionally lead to investigations involving technicality rather than substance.

Thus although actions by widows for dower or by tithe owners for an account of tithes are hardly likely to occur now, so as to afford an opportunity of citing *Williams v. Lambe* or *Collins v. Archer* as cases directly in point, still the proposition treated by Lord Westbury as established by those cases, viz. : "that the defence
"of purchase for valuable consideration did not apply
"where the Court of Chancery exercised a legal
"jurisdiction concurrently with Courts of Law," may at any future time give rise to the following four-fold technical investigation (that is to say) :

- (a) Could such an action as this have been brought in the Court of Chancery before the Judicature Acts?
- (b) If so, would the jurisdiction of the Court of Chancery have been concurrent only with that of the Courts of Law?
- (c) If so, is Lord Westbury's view as to the effect of the decisions of *Williams v. Lambe* and *Collins v. Archer* the correct view? or are those decisions to be treated as simply wrong?
- (d) If the former, is the defence wholly or only partially inapplicable? (a)

But whatever may be the doubts or difficulties attending the solution of any particular instances that may occur, this seems clear, viz.: that for the present, at least, a thorough knowledge and understanding of the doctrine of purchase for value without notice, as it existed before the Judicature Acts, is a necessary preliminary to estimating its applicability to litigation arising under the Acts, and it is on this account that we have, in the earlier portion of this sketch, dwelt somewhat more fully than might at first appear necessary on the reported decisions by which the nature and extent of the defence was gradually ascertained and determined.

(a) See pp. 410, 411, 415, 416, ante.

APPENDICES.

APPENDIX A.—(See p. 17.)

MARGARET APPILGARTH, WIDOW, *v.* THOMAS SERGEANTSON.

Bill complaining that the Defendant having obtained a sum of money of Plaintiff under a promise of marriage, has married another woman and refuses to return it.

To the right reverent Fadre in God the Bisshop of Bathe, Chaunceller of England.

Besecheth mekely Margaret Appilgarth of York wydewe, that where Thomas Sergeantson of the same, at diverse tymes spak to yo^r saide besecher ful sadly and hertly in hir conceit, and sought upon hir to have hir to wyfe, desiring to have of hir certain golde to the some of xxxvj. li for costes to bee made of their mariage, & to emploie in marchandise to his encrese & profit as to hir husbande. Wheruppon she havyng ful byleve & trust in his trouthe & langage, nor desiring of him eeny contract of matrymoine, delivered him the saide some at diverse tymes: afte the which liverie furthwith he nat willing to relivere the saide some to yo^r said bisechere hathe taken to wyfe an othre woman, in grete deceit, hurt, & uttre undooyng of hir, without, yo^r gracieux help & soco^r in this partie. Please it to yo^r good grace to conside the premisses, and that yo^r saide besechere no remedy hathe by the comone lawe to get ayeine the said some; and ther upon to graunte a writ

ayeins the saide Thomas to appere afore yow at a certaine day upon a certain peyne by you to bee lymit, to bee examined upon the premisses; and ther upon make him to doo as good feithe & consciens wol in this partie.—And she shall pray God for yow.

INDORSED ON THE BILL.

Memorand' quod quinto die Marcij Anno regni Regis Henrici sexti decimo septimo Thomas Wytham de com' Lincoln' gentilman & Robertus Danby de coñ Ebor' gentilman coram eodem domino Rege in Cancellaria sua personaliter constituti manuceperunt videlicet uterque eorum pro prefata Margareta quod ipsa in casu quo materiam in hac supplicatione specificatam veram probare non poterit tunc prefato Thome dampna & expensa que ipse ea occasione sustinebit satisfaciet juxta formam statuti in hac parte editi & provisi.—*Calendars of Proceedings in Chancery*, vol. i. p. xli.

APPENDIX B.—(See p. 17.)

HENRY HOIGGES v. JOHN HARRY.

Bill praying the Chancellor to restrain the Defendant by oath from using the arts of witchcraft, &c., by which he has injured Plaintiff, on account of his having been attorney in a suit against the prior of Bodmin, in whose service the Defendant is employed.

To the ryght worthy and reverent Holyfader & his gracious lord My lord of Bathe and Chaunceler of Engelond.

Most mekely bysechit and full pytuously compleynit yor pore & contynuall bedeman Henry Hoigges of Bodmyn of the counte of Cornewayll, Gentilman, certefyying you

gracious lord hov that late on Richard Flamank of the said counte, squyer, suwyd an oyer determyner ageyn Aleyn y^e Prior of Bodmyn of the said counte, so th^t yo^r said suppliant was wthholde as atto^rney with the said Richard in the said mater : on s^r John Harry of the said toun of Bodmyn prest and serv^{ant} of the said priour, of hys malys & evele wylle, ymagenyng by sotill craftys of enchauntement wycchecraft & socerye, malygnyd yo^r said suppliant endeles to destroye thurz wechecraft abowesaid, he brake his legge, and foul was hert : thurz th^e weche he was in despayr of his lyff : and more over contynualy fro day to day the said sotill craft of enchauntement wycchecraft and socerye usyth and occupyth, & in opyn plac['] pronuncit, & to fore many other dyvers persones holdely avowith & wol stonde thereby ; the weche th^t ys weel knowen to many folkys of the said counte. And more over in opyn plac['] saide th^t he wolde by ye said craft of enchauntement wycchecraft and socerye, wyrke yo^r said suppliant his nekke to breke, and hym endeles to destroye, with oute yo^r gracyous lordship eide and support. Plese on to yov gracyous lord of yo^r reverent paternyte, & of yo^r hye gracyous lordschip, to considere the gret myschef harme and damage y do un to yo^r said suppliant : and also the gret myschef th^t may falle to hym here after, & to all other th^t buth suturs & atto^rneys in availe to our sovereign lord the Kyng, & to ther cliant in all maters as reson and consience askyt and requyryth ; yn as so moche as th^e comyn lawe may nouzt helpe ; th^t ye wold fuchesef of yo^r benygne grace to graunte a writ of sub poena, dyret on to th^e said s^r John Harry, personaly to apere a fore you un to yo^r gracyous presence, at a certeyn day lyminyd up a certyn payn, hym duwely to examyne of all said premys, ydo on to yo^r said suppliant ageyn all ryght and reson'. And moreover hym to swere to forsake his eresy wicchecraft and socerye, & also hym to redresse & reforme to a good lyf ; & moreover hym to punysse in amendement and correccion of hys soule, yn exsample to all other of h^s secte,

And so to ordeyne a den remedye & a way after yo^r gracyous avys and dyscression, th^t yo^r said suppliant may have hys pees, with damag & exspenc' & th^t in th^e honor of God and in the wey of cheryte.—*Calendars of Proceedings in Chancery*, vol. i. p. xxiv.

APPENDIX C.—(See p. 21.)

WILLIAM DODD *v.* JOHN BROWING AND ANOTHER.

Defendants, feoffees in trust, had let Plaintiff's lands and withheld his goods without any authority.

To my worthy and gracious Lord Bisshope of Winchestre Chancellor of Yngelond.

Beseching mekely youre povre bedeman William Dodde charyot^r wheche passed overe the see in service w^t our liege lorde and was oon of his charioterys in his viages; & of hyze treste ffefed in my land Joh^an Browning and John — hull' of Chekewell w^t my wyfe, wheche Joh^an & Joh^an after azenste my wyll & wetynge pot my land to ferme, and delyvered my mevable good the valewe of xx marke where hem leste; & thus they kepe my dede & the dentre w^t my mevable good unto myne undoynge, lasse than y have youre excylent & g^acious helpe & lordship; besechinge yow at reverence of that worthy Prince ys sowle youre fader whoos bedeman y am evere, that ye woll sende for Joh^an & Joh^an affor seide, that the cause may be knowe why they w^tholde my good to myne undoynge: also wheche am undo for brusinge in servyce of our liege lorde, & in service of y^t worthy Princesse my lady of Clarence & ever wolde yef my lemys myght serve worthy prince sone. At reverence of God, and of that pereles Princes his moder take this mat^r at hert of almes and charitie.—*Calendars of Proceedings in Chancery*, vol. i. p. xiii.

APPENDIX D.—(See p. 94.)

An Assignment by the Heir unto the Feme.

To all persons, &c., T. S., son of T. S., late of —, deceased, sendeth greeting. Whereas, the said T. S., Father of me, the said T., was, during his life, lawfully seised in his demean as of Fee of and in divers lands and tenements, of which M., late wife of the said T., and now wife of R. G., citizen of London, was, at the time of his death, indowable, and thereof ought to have a full third part assigned limited and appointed unto her for her Dower. Now know ye that I, the said T. S., in consideration and for the Dower of her, the said M., have assigned, limited and appointed, and by these presents do assign, limit, and appoint unto the said R. G. and M., now his wife, mother of me, the said T. S., and late the wife of the said T., for the Dower of her, the said M., one piece and parcel of land, with the appurtenances, commonly called and known by the name of F., containing in the whole by estimation, &c., whether more or less, situate lying and being in, &c., and boundeth and butteth, &c., as the meets and bounds do divide and shew, and are well known, To have, &c., the said premises, with the appurtenances, unto the said R. G. and M., his wife, for the Dower of her, the said M., for and during the natural life of M., for and in the name of the reasonable dower of her, the said M. In witness whereof, &c.

Extracted from the "Perfect Conveyancer," printed 1655, page 190.

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